86-6139

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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CLARA WATSON,

Petitioner,

V.

FORT WORTH BANK & TRUST,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ART BRENDER
State Bar No. 02954500

LAW OFFICES OF ART BRENDER
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. Is the racially adverse impact of an employer's practice or simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of Griggs vs. Duke Power Co., 401 U.S. 424 (1971)?

2. Does the mathematically necessary use of different statistics to measure the varying results of an employer's racial bias preclude certification of one class of all victims of the bias?

3. Is joinder practicable among the past, present and future employees of an employer, of whom fifteen are past or present employees, and several of whom are unaware of their injuries?

4. Once having stricken an underpinning of a district court's Title VII Judgment, ought a Court of Appeals return the case to the district court to let the lower court, rather than the appellate court, in the first instance reconsider its judgment?

5. Is a district court's acceptance, in a Title VII case, of an employer's mutually contradictory explanations over a sequence of employment decisions, clearly erroneous?

LIST OF PARTIES

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NO. _____

IN THE

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CLARA WATSON,

Petitioner,

V.

FORT WORTH BANK & TRUST,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner herein prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit to review that Court's August 27, 1986 Judgment and Order in this proceeding.

OPINIONS BELOW

The Judgment and Opinions of the United States Court of Appeals for the Fifth Circuit from which review is sought, are reported at 796 F.2d 791 (5th Cir. 1986), and are attached as Appendix A to this Petition.

The Order of the Court of Appeals denying Petitioner's Suggestion For Rehearing En Banc, is reported at 796 F.2d 791 (5th Cir. 1986), and is attached as Appendix B to this Petition.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas from which Petitioner appealed, are not reported, but are attached as Appendix C to this Petition.

The Memorandum Opinion and Order of the District Court certifying Petitioner's original class, is not reported, but is attached as Appendix D to this Petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered the Judgment from which review is now sought, August 27, 1986. A timely Suggestion For Rehearing En Banc, the Court denied September 30, 1986. Jurisdiction is now conferred upon this Court by 28 U.S.C. sec. 1254(1).

STATUTES AND RULES INVOLVED

Sec. 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq., provides:

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Federal Rule of Civil Procedure 23, provides in relevant part:

> (a) Prerequisites to a class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class actions maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition.
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

STATEMENT OF THE CASE

The summer of 1973, Fort Worth Bank and Trust hired Clara Watson, Petitioner, a black, to the job of proof operator, and put her in a back room, not visible to the bank's customers. She joined only four other black employees: the porter, the kitchen attendant, and two others who printed checks in the basement.

Years passed and Clara Watson approached the bank's senior vice-president for personnel, Gary Snipp, with her interest in becoming a teller. Mr. Snipp put her off: a teller, after all, had to handle too much money "for blacks."

After seven years, Clara Watson sought appointment to four supervisory vacancies in succession. When Clara Watson's years of banking experience outdistanced her white competitor's, the bank ignored it. When her white competitor's experience outdistanced her own, the bank focused upon it. Each of the four supervisory vacancies was given to a less senior white - the last, to a young white man with a few months' experience.

Even the summer of her trial, after eleven years, Fort Worth Bank and Trust had no black officers or even supervisors. The supervisors, in whom the bank reposed unbridled authority to make employment decisions, hired - by the bank's own proof - 26% of available non-blacks and only 0% of available blacks; placed whites at least one pay grade above comparably qualified blacks; and paid whites some $46.00 per month more than even those blacks in the same pay grade.

Fort Worth Bank and Trust never even offered an explanation

for these statistics.

October 21, 1981, Clara Watson instituted this suit under 42 U.S.C. 1981 and 2000e et seq. and 28 U.S.C. 1343 and 2201 in the United States District Court for the Northern District of Texas, Fort Worth Division. March 4, 1983, and in the light of Gen. Tel. Co. of Southwest vs. Falcon, 457 U.S. 147 (1982), the Honorable Eldon B. Mahon certified one Plaintiff class of all past, present and future black applicants to and employees of Fort Worth Bank & Trust since October 21, 1979.

But by the time of trial, July 9, 1984, and apparently in the light of Falcon, Fort Worth Bank & Trust's senior vice-president for personnel recanted his earlier testimony and disclaimed his personal involvement in most of his bank's personnel decisions. The district court credited his recantation and November 20, 1984, convinced the recantation purged the Plaintiff class of its requisite commonality, split the class of black applicants and employees in two, found joinder among the latter practicable and decertified it, and tested the few surviving, individual claims of Clara Watson only on the rigorous disparate treatment theory. The stark inconsistencies of the bank's rationalizations in rebuttal notwithstanding, the court generally credited the rebuttal - even though the bank's shifting rationalizations could not have dispelled the discriminatory implications of the fourth promotion, had the court not considered sua sponte Clara Watson's then absence from the bank. The district court found no discrimination proven.

August 27, 1986, a divided panel of the United States Court of Appeals for the Fifth Circuit held the disparate impact theory unavailable to challenges to the practices at bar, parted with the lower court to hold the requisite typicality of a class action extinguished by the mere use of different statistics to measure the varied results of an employer's racial bias, but concurred upon the practicability of employee joinder, parted again with the lower court to hold its consideration of a justification never urged by the employer legally objectionable, but searched for and found an ample rebuttal of the inferences of discrimination among the employer's own inconsistent justifications.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S HOLDING THAT THE RACIALLY ADVERSE IMPACT OF AN EMPLOYER'S PRACTICE OF COMMITTING EMPLOYMENT DECISIONS TO THE UNCHECKED DISCRETION OF A WHITE SUPERVISORY CORPS CANNOT BE TESTED UNDER GRIGGS VS. DUKE POWER CO., 401 U.S. 424 (1971), IS IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, THE SIXTH, THE SEVENTH, THE TENTH, THE ELEVENTH, AND THE DISTRICT OF COLUMBIA CIRCUITS.

To the summer of Petitioner Clara Watson's trial, the Respondent Fort Worth Bank & Trust had never employed a black director, a black officer, or a black supervisor - a self-perpetuating result of the bank's delegation of authority for hirings and promotions to the unregulated discretion of its always white officers and white supervisors. This delegation was Fort Worth Bank & Trust's routine, if subjective, procedure for testing the qualifications of its applicants and employees - a procedure, because routine, and unlike the quite individualized decision at issue in McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973), subject to the strictures upon classificatory tendencies of sec. 703(a)(2) of Title VII and Griggs vs. Duke Power Co., 401 U.S. 424 (1971). See Hawkins vs. Bounds, 752 F.2d 500, 503 (10th Cir. 1985); Rowe vs. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88, 93 (6th Cir. 1982). Only Griggs' examination of the results of, rather than McDonnell Douglas' hunt for the motivations harbored in, the bank's procedures, could root out of the subjective procedures elements of the routine that systematically disadvantaged blacks while making no compensating contribution to the business of the bank. See Segar vs. Smith, 738 F.2d 1249, 1288 (D.C. Cir. 1984).

The district court, however, limited its inquiry to a McDonnell Douglas hunt for particularized discriminatory feelings against Clara Watson - and in conflict with 29 C.F.R. sec. 1607.16(q), the pertinent guideline promulgated by the federal agencies enforcing Title VII, and in conflict with the law of several other circuits, see e.g. Shidaker vs. Carlin, 782 F.2d 746 (7th Cir. 1986); Griffin vs. Carlin, 755 F.2d 1516 (11th Cir. 1985); Hawkins vs. Bounds, 752 F.2d 500 (10th Cir. 1985); Segar vs. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Rowe vs. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Grant vs. Bethlehem Steel Corp., 635 F.2d 1007 (2nd Cir. 1980), the Court of Appeals below held that the district court could not have broadened its inquiry, that Griggs has no application to routine procedures involving even unnecessary elements of discretion.

II. THE FIFTH CIRCUIT'S HOLDING THAT THE MATHEMATICALLY NECESSARY USE OF DIFFERENT STATISTICS TO MEASURE THE VARYING RESULTS OF AN EMPLOYER'S RACIAL BIAS PRECLUDES CERTIFICATION OF ONE CLASS OF ALL VICTIMS OF THE BIAS, IS IN CONFLICT WITH THE DECISIONAL LAW OF THE FOURTH, THE EIGHTH, AND THE DISTRICT OF COLUMBIA CIRCUITS, AND DRAINS THE MEANING FROM THIS COURT'S DECISION IN GEN. TEL. CO. OF SOUTHWEST VS. FALCON, 457 U.S. 147 (1982).

At her class certification hearing and at her trial, Petitioner Clara Watson adduced proof not only of her own promotional opportunities, at Respondent Fort Worth Bank & Trust, lost to less deserving whites, but also of the bank's routine delegation of authority for all personnel decisions to the unregulated discretion of its departmental supervisors, a routine

delegation of which her lost promotions were one result, of which the sluggish advancement of other black employees was a second result, and of which the almost imperceptible trickle of black applicants hired into the bank was a third result. This was the very proof, tying employees to applicants, upon which Gen. Tel. Co. of Southwest vs. Falcon, 457 U.S. 147, 158 (1982) insisted.

Hence, the district court at first permitted Petitioner to represent the class of all black victims, employees and applicants, of Respondent's single decisionmaking process; but when Respondent's senior vice-president for personnel recanted earlier testimony, and forswore personal involvement in all personnel decisions, the court misread Falcon to preclude class certification where all decisions are not traceable to one individual, and decertified Petitioner's class. This one changed fact, this one misreading of Falcon, triggered the district court's change of heart - plainly an abuse of discretion. Cf. Bazemore vs. Friday, _____ U.S. _____, _____ S.Ct. _____, 92 L.Ed.2d 315, 334 (1986).

The Court of Appeals avoided this, alighting instead upon a distinct ground for decertification present from the outset, and therefore a ground with which the district court must not have agreed. Petitioner had adduced proof of an utterly subjective decisionmaking process, at Fort Worth Bank & Trust, that could infect promotions and hirings with racial preferences; distinct proof of racial disparities in promotions, thus impugning the motivations of white supervisors who also decided upon hirings;

and distinct proof or consequently not surprising racial disparities in hiring. In conflict with the law of other circuits, see e.g. Holsey vs. Armour & Co., 743 F.2d 199, 216 (4th Cir. 1984); Paxton vs. Union National Bank, 688 F.2d 552, 562 (8th Cir. 1982); McKenzie vs. Sawyer, 684 F.2d 62, 74 (D.C. Cir. 1982), the Court of Appeals insists that employee and applicant injuries will never be typical, within the meaning of Federal Rule of Civil Procedure 23(a)(3), unless the proof of disparities in promotion and the proof of disparities in hiring can be collapsed into one statistic, a mathematical impossibility that would drain Falcon's excepting footnote 15 of all meaning.

III. THE FIFTH CIRCUIT'S HOLDING THAT JOINDER IS PRACTICABLE AMONG THE PAST, PRESENT AND FUTURE EMPLOYEES OF AN EMPLOYER, OF WHOM FIFTEEN ARE PAST OR PRESENT EMPLOYEES, AND SEVERAL OF WHOM ARE UNAWARE OF THEIR INJURIES, IS IN CONFLICT WITH THE DECISIONAL LAW OF THE SIXTH, THE EIGHTH, AND THE TENTH CIRCUITS.

Perhaps because Respondent Fort Worth Bank & Trust had hired so few of its black applicants, see Cross vs. National Trust Life Insurance Co., 553 F.2d 1026, 1030 (6th Cir. 1977), few black persons, fifteen, were privileged to be among the employees who suffered under the bank's racial preferences. Subtracting from this number three black women who testified to no awareness of such preferences, the district court found joinder of the remainder practicable and refused certification of a Federal Rule of Civil Procedure 23(b)(2) employee class.

Though the impracticability of joinder is not belied, but attested to by employees' ignorance of discrimination against

them, see Paxton vs. Union National Bank, 688 F.2d 552, 560 (8th Cir. 1982), by the difficult position of any employee, naturally reluctant to join in haling her employer into court, see Horn vs. Associated Wholesale Grocers, Inc., 555 F.2d 270, 275 (10th Cir. 1977), and by the legal impossibility of any collection of employees, independently joined, securing the complete, broad-based injunctive relief for themselves, their colleagues and future employees that may be gotten in a Rule 23(b)(2) class action, see Paxton, 688 F.2d at 561; Horn, 555 F.2d at 275; Cross, 553 F.2d at 1030, the Court of Appeals, in conflict with these circuits, left the decision of the district court undisturbed.

IV. THE FIFTH CIRCUIT'S PROCEEDING, AFTER HAVING STRICKEN AN UNDERPINNING OF THE DISTRICT COURT'S TITLE VII JUDGMENT, TO ATTEMPT TO AFFIRM THE JUDGMENT ON OTHER GROUNDS, RATHER THAN RETURNING THE CASE, ABSENT THE OBJECTIONABLE UNDERPINNING, TO THE TRIAL COURT FOR ITS OWN RECONSIDERATION, CONFLICTS WITH THE DECISION OF THIS COURT IN LEHMAN VS. TROUT, 465 U.S. 1056 (1984).

On four occasions, Petitioner Clara Watson sought out promotions to Respondent Fort Worth Bank & Trust's white supervisory ranks. On the fourth and last occasion, after seven years with the bank, she lost out to a young white at the bank only a few months. This was, uneasily, explained by the district court partly on the basis of Petitioner's absence from the bank on a medical leave at the moment of her rejection, but the bank never advanced that explanation. The Court of Appeals therefore disregarded it, and nevertheless proceeded to find support for the

district court's judgment in other explanations the bank had advanced.

After having stricken one of the underpinnings of the district court's judgment, the Court of Appeals in Lehman vs. Trout, 465 U.S. 1056 (1984) was instructed not to attempt to find support for the judgment elsewhere in the record, but rather to remand to the district court for its own plenary reconsideration of the judgment. The present case is no different.

V. THE FIFTH CIRCUIT'S HOLDING THAT ACCEPTANCE BY THE DISTRICT COURT OF THE EMPLOYER'S MUTUALLY CONTRADICTORY EXPLANATIONS OVER A SEQUENCE OF EMPLOYMENT DECISIONS WAS NOT CLEARLY ERRONEOUS, IS IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, THE EIGHTH, AND THE ELEVENTH CIRCUITS.

Petitioner's experience in banking was not always ignored. It was on two occasions, when Petitioner's experience surpassed her competitor's. But on the two other occasions, when her experience fell short of her white competitor's, it became the focal point of the promotion decision.

Though Anderson vs. Bessemer City, _____ U.S. _____, _____ S.Ct. _____, 64 L.Ed.2d 518, 529 (1985) left the Courts of Appeals free to discredit such obvious inconsistencies, and though other circuits have held strikingly similar "ad hoc, contradictory and conflicting explanations" legally insufficient to rebut inferences of individual discrimination, Paxton vs. Union National Bank, 688 F.2d 552, 566 (8th Cir. 1982); see also, e.g., Walker vs. Jefferson County Home, 726 F.2d 1554, 1559 (11th

Cir. 1984); Grant vs. Bethlehem Steel Corp., 635 F.2d 1007, 1014 (2nd Cir. 1980), the Court of Appeals below left the district court's acceptance of this inconsistency undisturbed.

CONCLUSION

For the foregoing reasons, Petitioner prays that a Writ of Certiorari issue to review the August 27, 1986 Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ART BRENDER
State Bar No. 02954500

LAW OFFICES OF ART BRENDER
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171

ATTORNEY FOR PETITIONER

(3)

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BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

John W. Howard
State Bar No. 10071300
Candy, Kitchener, Swindle
Whitaker & Pratt
2501 Parkview Drive
Suite 600
Fort Worth, Texas 76102
(817) 878-0575

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Is the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of Griggs vs. Duke Power Co., 401 U.S. 424 (1971)?

2. Does the use of different mathematical statistics to measure the varying results of an employer's racial bias necessarily preclude certification of one class of all victims of the bias?

3. Is joinder practicable among the past, present and future employees of an employer, of whom fifteen are past or present employees, and several of whom are unaware of their injuries?

4. Having disregarded one of several factual findings and conclusions of law of a district court's Title VII Judgment, ought a Court of Appeals return the case to the district court to let the lower court reconsider its judgment.

5. Is a district court's acceptance, in a Title VII case, of an employer's mutually contradictory explanations over a sequence of employment decisions, clearly erroneous?

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FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

To The Honorable Court, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent herein prays that a Writ of Certiorari be denied to the United States Court of Appeals for the Fifth Circuit in that the Fifth Circuit's judgment and opinion of August 27, 1986 is correct and not in conflict with decisional law of other circuits.

OPINIONS AND JUDGMENTS BELOW

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent omits citations to the opinions and judgments delivered in the courts below in that same is accurately set forth in Petitioner's Application for Writ of Certiorari.

JURISDICTION

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent omits a statement of jurisdiction on the basis that Petitioner has accurately set forth the jurisdictional grounds in its Application for Writ of Certiorari.

STATUTES AND RULES INVOLVED

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent has omitted setting forth the constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves on the basis that this information has been accurately set forth by Petitioner in its Application for Writ of Certiorari.

STATEMENT OF THE CASE

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent omits a statement of the case on the basis that Petitioner's statement of the case as set forth in its Application for Writ of Certiorari is essentially accurate. However, Respondent objects to the argumentative portions of the statement of the case as set forth in Petitioner's Application for Writ of Certiorari.

SUMMARY OF ARGUMENT

Pursuant to Rule 34.1(h) of the Supreme Court Rules, the following is a brief condensation of the argument contained in Respondent's Brief in Response to Application for Writ of Certiorari. Pursuant to Rule 34.1(h) of the Supreme Court Rules:

Under Point I, Respondent argues that the Fifth Circuit correctly applied the disparate treatment analysis found under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1978), to the facts in the instant case. The disparate impact analysis, which Petitioner argues should apply to the facts in the instant case, is the improper analysis under the facts in the case at bar. The Supreme Court of the United States has held that the disparate impact analysis should be used in situations where there is a specific, facially neutral selection criterion that can be shown to have a causal connection to a racial imbalance in the work force. However, where the facts of a particular case show that the pertinent employment decision is made on a discretionary and subjective basis, the disparate treatment analysis is applicable. The facts in the case at bar reflect that the disparate treatment analysis was the proper analysis by which to evaluate Petitioner's claim for discrimination in employment.

Respondent argues under Point II that the Fifth Circuit was correct in holding that the Trial Court did not abuse its discretion in decertifying the class of applicants on the basis

that Petitioner was not an adequate representative of the applicant class. It is Respondent's position that the significant difference in the statistical evidence presented by the applicant class versus the employee class, clearly showed that Petitioner was not an adequate representative for the applicant class. However, contrary to Petitioner's assertions, the Fifth Circuit's holding does not stand for the proposition that merely because two identifiable groups are required to use different mathematical statistics in presenting their case, that this precludes certification of those two groups and to a single class.

Respondent argues in Point III that the Fifth Circuit correctly held that the Trial Court did not abuse its discretion in decertifying the employee class on the basis that said class could not satisfy the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure. The Fifth Circuit's holding is not in conflict with the decisional law of other circuits as Petitioner contends, rather, the Fifth Circuit applied the well settled abuse of discretion standard in reviewing the Trial Court's rulings on matters of class certification.

Respondent argues in Point IV that the Fifth Circuit correctly affirmed the Trial Court's judgment in finding that the bank's explanations for its actions were not pretexts for discrimination. Petitioner has asserted that the Fifth Circuit set aside an underpinning of the District Court's Title VII Judgment, and thereafter proceeded to render judgment rather

than returning the case to the Trial Court for reconsideration. Respondent contends that the Fifth Circuit did not strike an underpinning of the Trial Court's judgment. Rather, the Fifth Circuit gave Petitioner the benefit of the doubt and disregarded certain admissible evidence which was properly considered by the Trial Court but not asserted by the bank. After disregarding this evidence favorable to Respondent, the Fifth Circuit, in applying the "clearly erroneous" standard, nevertheless affirmed the Trial Court's holding that the explanations offered by the bank were not pretexts for discrimination.

Respondent argues under Point V that the Fifth Circuit correctly applied the "clearly erroneous" standard in affirming the Trial Court's holding that the bank's explanations for its actions were not pretexts for discrimination. Although the bank's explanations for its actions may have contained certain inconsistencies, the Fifth Circuit correctly held that the inconsistencies were not so striking as to make the banks proferred reasons incredible. The Fifth Circuit correctly found that there were two permissible views of the evidence, and, therefore, the Trial Court's holding was not clearly erroneous. Furthermore, the application of the "clearly erroneously" standard is not in conflict with the decisional law of other circuits, rather, is the well settled standard of review.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE DISPARATE TREATMENT ANALYSIS TO PLAINTIFF'S INDIVIDUAL CLAIM OF DISCRIMINATION IN EMPLOYMENT IS CONSISTENT WITH THE RATIONALE AND OPINIONS OF THIS HONORABLE COURT AND THE PRIOR OPINIONS OF THE FIFTH CIRCUIT COURT OF APPEALS.

The Fifth Circuit Court of Appeals has held that a challenge to an allegedly discretionary promotion procedure fits within the "disparate treatment" analysis, rather than the "disparate impact" analysis under Title VII. (Emphasis ours). Lewis v. N.L.R.B., 750 F.2d 1266 (5th Cir. 1985); Carroll v. Sears Roebuck Co., 708 F.2d 183 (5th Cir. 1983); Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795 (5th Cir. 1982). One must note the emphasis on the word "discretionary" in describing the particular promotion procedure. Where the promotion procedure is a purely discretionary procedure, the Fifth Circuit has followed established precedence in applying the disparate treatment analysis. However, where there exists a specific, facially neutral selection criterion or procedure, the disparate impact model or analysis may be applicable. This distinction was pointed out by the Fifth Circuit in Carroll. In that case, on appeal, Plaintiff contended that the evidence presented to the District Court established a prima facie case of racial discrimination under the disparate impact theory in hiring, promotion, job classification, training, termination, and testing practices of Sears. The evidence reflected that in all areas except the testing practices that the decisions were largely discretionary and subjective. The Court held:

> We conclude, however, that the proof adduced at trial does not fit the disparate impact model. The use of subjective criteria to evaluate employees in hiring and job placement decisions is not within the category of facially neutral procedures to which the disparate impact model is applied. (citations omitted). With respect to training, promotion, termination and job classification, the Plaintiffs have failed to focus on a facially neutral, objective employment practice that the disparate impact model was designed to test. Under Pouncy, the disparate impact model can no longer serve as a vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices. Pouncy, 668 F.2d at 800. We must therefore analyze the Plaintiff's challenge to Sears employment practices under the disparate treatment model. The only employment practice subject to analysis under the disparate impact model is Sears testing of employees. See Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). The use of a test is a specific, facially neutral selection criterion that can be shown to have a causal connection to a racial imbalance in the work force. This selection criterion is the kind of employment practice to which the disparate impact model traditionally has applied.
>
> Carroll, 708 F.2d at 188-189.

The Court in Carroll went on to hold that the evidence adduced at trial failed to show that the lower scores of blacks on the test was a factor in employment decisions that caused fewer blacks to be selected.

This same distinction was noted by this Honorable Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L.Ed. 2d 396, 97 S.Ct. 843 (1977). In Teamsters, the United States brought suit against a private employer and against the Teamsters Union alleging that the company had engaged in a

pattern or practice of discriminating against minorities in hiring so called "line drivers". The government alleged that the minorities had been hired and were given lower paying, less desirable jobs, as servicemen or local city drivers and were thereafter discriminated against with respect to promotion and transfers. Secondly, Plaintiffs alleged that the collective bargaining agreement between the Company and the Union contained a seniority system that set forth specific criteria which directly affected an employee's benefits, such as vacations, pensions, layoffs and recalls. The practical effect of the seniority system required a city driver or serviceman who transferred to a line driver job to forfeit all competitive seniority. The vice of this arrangement was that it "locked" minority workers to inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers.

With regard to Plaintiff's first complaint of intentional discrimination, the Supreme Court, in applying the disparate treatment analysis of McDonnell Douglas v. Green found that the Company had engaged in systematic and purposeful employment discrimination. Teamsters, 431 U.S. at 343. In connection with Plaintiff's second complaint concerning the detailed seniority system which locked minority workers into inferior jobs and perpetuated prior discrimination, the employer and Union defended on the basis of Section 703(a) of Title VII which provided an exception to discrimination for a bona fide seniority system.

Although this defense ultimately prevailed, the Supreme Court noted that the detailed seniority system would more reasonably fall within the test set forth in Griggs v. Duke Power Co., 401 U.S. 424 28 L.Ed 2d 158, 91 S.Ct. 849 (1971). This Honorable Court held:

> Were it not for Section 703(a), the seniority system in this case would seem to fall under the Griggs rationale. The heart of its system is its allocation of the choices job, the greatest protection against lay-offs, and other advantages to those employees who have been line drivers for the longest time.
>
> Teamsters, 431 U.S. at 349.

It seems clear that a distinction is drawn by the Courts between the disparate treatment and disparate impact analysis. Where there exists a specific, facially neutral selection criterion that can be shown to have a causal connection to a racial imbalance in the work force, then the Courts will apply the disparate impact analysis. However, as has been held by this Honorable Court and the Fifth Circuit Court of Appeals, where there exists a purely discretionary and subjective hiring process, the disparate treatment analysis is applicable. While this distinction has not been examined by each and every circuit, it has been the basis of a majority of the holdings in those cases cited by Petitioner as being in conflict with the Fifth Circuit's holdings. See, Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (use of a facially neutral promotion system which involved selection of employees to fill temporary positions to

learn a job position, which ultimately became a requirement for a job promotion); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982) (use of separate and distinct hiring procedure for former employees versus normal method of hiring new employees); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (use of multi-component promotion process including promotion advisory boards, awards, discipline and written tests).

It is respondents position that a clear distinction has been drawn by this Honorable Court and adopted by the Fifth Circuit regarding the application of the disparate treatment and disparate impact models. Where there exists a specific, facially neutral selection criterion or procedure which adversely impacts a protected group, then the disparate impact model may be applied. However, where the selection criterion is purely selective and discretionary, the disparate treatment model is applicable. In the case at bar, the evidence was clear that the question of hiring and promotion was a discretionary and subjective matter which rested in the hands of several bank supervisors. Accordingly, the disparate treatment model was the proper test in determining petitioner's claim of racial discrimination.

II. THE FIFTH CIRCUIT'S RECOGNITION OF THE USE OF DIFFERENT MATHEMATICAL STATISTICS TO MEASURE THE VARYING RESULTS OF AN EMPLOYER'S ACTS IN HIRING AND PROMOTION DOES NOT PRECLUDE CERTIFICATION OF THESE TWO GROUPS INTO A SINGLE CLASS.

Petitioner is wrong in asserting that the Fifth Circuit has held in the case at bar that the use of different mathematical statistics to measure the varying results of an employer's acts in hiring and promotion necessarily precludes the certification of these two groups into a single class. Such is clearly not the holding of the Fifth Circuit in the case at bar. Petitioner goes on to assert that the Fifth Circuit Court of Appeals misread General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed. 2d 740 (1982). To the contrary, the Fifth Circuit correctly interpreted and applied Falcon to the facts in the instant case.

A District Court's class certification order is reviewed under an abuse of discretion standard. Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986). In the case at bar, the District Court originally certified a class consisting of blacks who applied or who were employed by the defendant. Subsequently, the District Court de-certified this broad class of employees and applicants because the District Court concluded in light of all the evidence at trial, that there was not a common question of law and fact between the unsuccessful black applicants and those blacks employed by the bank. The District Court further de-certified the employee class because it did not meet the new numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure.

In the case at bar, the Fifth Circuit's opinion acknowledges the general rule in Falcon that a Title VII class action, like any other class action may only be certified if the Trial Court is satisfied that the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure have been satisfied. Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 795, (5th Cir. 1986). Furthermore, the Court also acknowledges the exception to the general rule as set forth in footnote 15 of the Falcon opinion and the exception as set forth in Chief Justice Berger's concurring and dissenting opinion. Watson, 798 F.2d at 795-96. Nonetheless, the Fifth Circuit gives tacit approval to the holding of the District Court that Petitioner failed to show the existence of common questions between the applicants and employees claims, in that the same individual was not responsible for both hiring and promotion decisions. Watson, 798 F.2d at 796. However, the Fifth Circuit went one step further. The Court went on to assume that the exception as set forth in footnote 15 of Falcon was satisfied. The Court then holds:

> Assuming, arguendo, that Watson is correct, this Court's inquiry does not end with that conclusion. We cannot conclude that certification of a class of both employees and applicants is mandated merely because common questions exists. Rather, other factors enunciated in Rule 23(a) also must be considered. Thus, assuming a common question was presented in the instant case, e.g., whether the same limited group of white supervisors discriminated in both hiring and promotions. That common question was not in fact a central feature in the actual proof presented at trial. The applicant class claims relied primarily on applicant flow statistics. In contrasts, the proof asserted in support of the promotions claims focused on statistical evidence of the banks

> treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices. Consequently, the actual proof presented demonstrates that Watson's promotion claim was not typical of the applicant class claims, and she was not an adequate class representative.
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> Watson, 798 F.2d at 796.

Thus, the Fifth Circuit's holding does not stand for the proposition that a group of applicants and current employees can never be certified as one class simply because different statistical evidence may be used by the separate group. In fact, petitioner has assumed that different mathematical statistics must always be used by these two groups. The essence of the Fifth Circuit's holding in the case at bar is simply that the statistical evidence presented by the applicant class was so significantly different than the statistical evidence presented by the employee class, that petitioner (as an employee) was not an adequate representative of the applicant class within the meaning of Rule 23(a).

Petitioner asserts that the Fifth Circuit has drained all meaning from footnote 15 of the Falcon opinion. To the contrary, the Fifth Circuit gave petitioner the benefit of the doubt in assuming arguendo that petitioner fell within the exception as set forth in footnote 15 of the Falcon opinion. However, Petitioner could still not satisfy Rule 23(a) in that Petitioner was not an adequate representative for the applicant class. The holding by the Fifth Circuit in the case at bar is not in

conflict with the law of other circuits as cited by Petitioner. For instance, Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) (cited by Petitioner), deals with the certification of two separate classes. One class was comprised of individuals denied promotion, while another class was comprised of individuals who had been wrongfully discharged. In that case, the Court found that Phyllis Mosley was a proper class representative for both the promotion class and the discharge class. However, the facts show that Mosley had been denied promotion and had been discharged from her telephone clerk position on account of her race. Paxton, 688 F.2d at 563 and 566. Furthermore, there is nothing inconsistent with the Paxton Court's application of Falcon and the application of Falcon by the Fifth Circuit in the case at bar.

In Holsey v. Armour & Co., 743, F.2d 199 (4th Cir. 1984) (cited by Petitioner), the Court's application of Falcon is consistent with the application of Falcon by the Fifth Circuit Court of Appeals. In Holsey, the Court refused to affirm a single class of promotion and hiring claims because the District Court made no finding that the supervisors who had made the challenge promotions decisions were the same persons who made hiring decisions. The Court held that, ."although the certification question is a close one, we conclude that the significant proof for single class treatment required by Falcon is lacking in this case, and thus the plaintiffs cannot

adequately represent the outside applicants for sales and supervisory positions." Holsey, 743, F.2d at 216. Finally, McKenzie v. Sawyer, 684, F.2d 62, (D.C. Cir. 1982) deals with an unrelated issue of the application of Title VII relief to various members of a class once liability has been established.

It is clear that the Fifth Circuit's holding in the case at bar is consistent with Falcon. The Fifth Circuit's holding does not preclude the certification of a class of applicants and employees merely because these groups might use different mathematical statistics. Rather, the Fifth Circuit's holding in the case at bar simply reflected that the significantly different statistical evidence proferred by the class of applicants and the class of employees reflected that petitioner was not an adequate class representative for the applicant class.

III. THE FIFTH CIRCUIT'S DECERTIFICATION OF THE EMPLOYEE CLASS ON THE BASIS THAT IT FAILED TO MEET THE NUMEROSITY REQUIREMENT OF RULE 23(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE SIXTH, THE EIGHTH AND THE TENTH CIRCUITS.

In its opinion below, the Fifth Circuit held that a District Court's class certification order is reviewed under an abuse of discretion standard. Watson, 798 F.2d at 795; Jenkins v. Raymark Industries, Inc. 782 F.2d 468 (5th Cir. 1986). It is well settled that the determination of the propriety of a class action is ordinarily a matter within the sound discretion of the trial court. Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); Hornreich

v. Plant Industries, Inc., 535 F.2d 550 (9th Cir. 1976); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970). The Court below held that it found no abuse of discretion in the District Courts class decertification decision. Watson, 798 F.2d at 799. The Fifth Circuit's review of the trial court's decisions concerning the viability of the class actions in the case at bar was based on an abuse of discretion standard, and the Fifth Circuit determined that the trial court did not abuse that discretion. This analysis and holding is not in conflict with the law of the Sixth, Eighth and Tenth Circuits, rather, it is in accord with the standard of review invoked by those circuits.

Petitioner cites three cases to this Honorable Court which Petitioner claims are in conflict with the holding of the Fifth Circuit in the instant case. In Cross v. National Trust Life Insurance Co., 553 F.2d 1026 (6th Cir. 1977), the Sixth Circuit reversed the trial court's determination and denial of a particular class. The Sixth Circuit initially stated the well settled rule that the District Court has broad discretion in determining whether a case can proceed as a class action. Cross, 553 F.2d at 1030. In that case, the trial court had inaccurately determined the parameters of the actual class. The trial court originally applied the class to only black sales agents in a specific group. The Sixth Circuit held that the class had not been defined properly in that it would have been much larger if the trial court had defined the class properly. In that regard,

the trial court's denial of the certification of the class on the basis of the numerosity requirement was improper.

In Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977), the trial court refused to decide whether to certify the proposed class until after the trial on the merits. At that time, the trial court denied certification of the class on the numerosity requirement alone. The Tenth Circuit, in holding that the failure to certify the class was error, based its decision on the combination of the postponement of the question of certification and the denial of certification on the numerosity requirement alone. The Court held, "the postponement coupled with denial on this ground (numerosity) was unwarranted." Horn, 555 F.2d at 275. Finally, Petitioner cites the Court to Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982). In that case, the Eighth Circuit cited Horn in attacking the practice of delaying certification of a class until after the trial on the merits is completed. Paxton, 688 F.2d at 558. Furthermore, as previously discussed, Paxton dealt with the certification of two classes which consisted of a promotion class and a discharge class. The facts in Paxton showed that the class representative for the promotion class (Mosley) was a proper representative of the discharge class as well. The facts reflected that Mosley had been denied various promotions and had been discharged on the basis of her race.

Although Petitioner attempts to argue that the Fifth Circuit's affirmance of the trial courts decertification of the employee class in the instant case is in conflict with the decisions of other circuits, it is clear that the Fifth Circuit merely applied the proper abuse of discretion standard in determining whether the trial court's decertification of the class was proper.

IV. THE FIFTH CIRCUIT'S ACTION IN DISREGARDING CERTAIN EVIDENCE AND PROCEEDING TO AFFIRM THE TRIAL COURT'S JUDGMENT ON THE BASIS OF THE REMAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE TRIAL COURT WAS NOT IN CONFLICT WITH THIS HONORABLE COURT'S DECISION IN LEHMAN V. TROUT, 465 U.S. 1056 (1984).

Petitioner attempts to argue that the Fifth Circuit disregarded an underpinning of the District Court's judgment, and thereafter proceeded to affirm the judgment on other grounds. Petitioner contends that this practice is in conflict with the decision of this Honorable Court in Lehman v. Trout, 465 U.S. 1056 (1984). First, the trial court's conclusion of law number eight, sets forth an analysis of the bank's decision to promote Kevin Brown instead of Petitioner to a motor bank supervisor in February 1981. The Court details the evidence presented at trial which included that Brown's supervisor regarded him highly for his performance as a teller and his experience as her assistant. Furthermore, the evidence reflected that Brown got along well with other employees while Petitioner had some difficulty in her relationship with co-workers. The bank also relied on Brown's experience in supervising 30 to 40 temporary workers at Six Flags

Over Texas. The Court also noted that Plaintiff was out on sick leave when the position came open in 1981. In contrast, Brown was available immediately to assume the motor bank position. Although the bank did not rely on the fact that Plaintiff was out on sick leave at the time the position became open, the evidence was presented at trial without objection and was properly before the trial court.

On appeal, the Fifth Circuit detailed the evidence surrounding the Bank's promotion of Kevin Brown over Petitioner. The Fifth Circuit, in applying the clearly erroneous standard of review, gave Petitioner the benefit of the doubt and disregarded the evidence that Petitioner was on sick leave when the positions became available. However, the remaining evidence before the trial court was sufficient to uphold the trial court's finding and establish that the trial court's action was not clearly erroneous.

In Lehman v. Trout, this Honorable Court was presented with a different situation. It that case, a class of female professional employees alleged that they had been discriminated against on the basis of their sex in violation of Title VII. The District Court found discrimination in both hiring and promotion. On appeal, the Court of Appeals found that the District Court erred in its finding concerning discrimination in hiring in that the District Court had considered certain employment decisions as being actionable, when in fact, the hiring decisions and the

pre-1972 discrimination were not actionable. The United States Supreme Court granted writ of certiorari and vacated the judgment. The case was remanded to the District Court on the question of what evidentiary value Respondent and Petitioner's statistical evidence would have in light of the Court of Appeal's conclusions that certain employment decisions were not actionable. In Lehman, the trial court had committed error in concluding that certain conduct was in fact actionable under Title VII. Petitioners had apparently presented varying statistical evidence on both their hiring and promotion claims. Once the hiring claims were determined not to be actionable by the appellate court, it would seem logical that the trial court would have to reconsider the evidence presented and determine whether it was sufficient to support the remaining claim.

In the case at bar, the trial court committed no error in considering the fact that Petitioner was on sick leave at the time the positions became available. That evidence was presented before the Court without objection and was properly before the Court in reaching it conclusions of law. Furthermore, the Fifth Circuit gave Petitioner the benefit of the doubt in applying the clearly erroneous standard of review by disregarding this particular evidence. The Fifth Circuit's action was proper and was not in violation of the decision of this Honorable Court in Lehman v. Trout.

V. THE FIFTH CIRCUIT'S HOLDING THAT THE TRIAL COURT'S FINDING THAT THE BANK'S EXPLANATIONS FOR ITS ACTIONS WERE NOT PRETEXTS FOR DISCRIMINATION WAS NOT CLEARLY ERRONEOUS WAS PROPER AND IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT AND NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, EIGHTH AND ELEVENTH CIRCUITS.

Petitioner asserts that the alleged inconsistencies in the bank's explanations for its actions apparently precluded the trial court from determining that the explanations were not pretexts for discrimination. Apparently, Petitioner would also suggest that the inconsistencies would preclude the Fifth Circuit from upholding the trial court's finding. In reviewing the District Court's determination that the bank's explanations were not pretexts for discrimination, the Fifth Circuit relied on several decisions of this Honorable Court in explaining the standard of review:

> After hearing all the evidence, including the statistical evidence, the District Court concluded that the reasons offered by the bank were not pretextual. We judge this holding under the clearly erroneous standard. Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed 2d 66 (1982). We conclude that the District Court's findings that the bank's explanations for its action were not pretexts for discrimination is not clearly erroneous. The District Court's finding will not be set aside unless the Court on the entire evidence is left with the 'definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525 92 L.Ed 2d 746 (1948). 'Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.' Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed 2d 518 (1985).
>
> Watson, 798 F.2d at 798.

Although the Fifth Circuit did recognize that the reasons articulated for Kevin Brown's promotion were somewhat

inconsistent with the bank's articulated reasons for the promotions of other employees, the Court went on to hold that the inconsistency was not so striking as to make the bank's proffered reasons incredible. Watson, 798 F.2d at 799. It was the Fifth Circuit's opinion that the record supported "two permissible views of the evidence," and therefore, the trial court's finding regarding the Brown promotion was not clearly erroneous. Watson, 798 F.2d at 799.

Petitioner cites this Court to its holding in Anderson v. Bessemer City for the proposition that the Courts of Appeals are free to discredit obvious inconsistencies. However, in Anderson, the Supreme Court reversed the Appellate Court for failing to stay within the guidelines of the clearly erroneous standard. In Anderson, the Supreme Court stated that "the standard plainly does not entitle a reviewing Court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a District Court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Anderson, 84 L.Ed 2d at 528. In Paxton v. Union National Bank, 688 F.2d 552, 566 (8th Cir. 1982), the Court also applied the purely erroneous standard. Paxton, 688 F.2d at 564. In applying that standard,

the Court in Paxton found that the evidence before the trial court reflected that the Defendants offered little or no evidence to explain the disparaties in promotions. Furthermore, no explanation whatsoever was proffered by Defendants to justify the salary discrimination between blacks and whites who were promoted within the same salary ranges. Paxton, 688 F.2d at 566. Under those facts and circumstances, the evidence simply did not allow for two permissible views of the evidence. However, the facts before the trial court in the case at bar clearly established, despite some inconsistencies, that there were two permissible views of the evidence. Petitioner's reliance on Grant v. Bethleham Steel Corporation, 635 F.2d 1007, 1014 (2nd Cir. 1980), is misplaced in that there is no inconsistency between that case and the Fifth Circuit's holding in the instant case.

The Fifth Circuits holding in the instant case properly applied the clearly erroneous standard of review confirming the trial court's finding that the bank's explanation for its actions was not pretexts for discrimination. The evidence before the trial court in the case at bar established that there are two permissible views of the evidence, and, accordingly, the fact finder's choice between them cannot be clearly erroneous. The Fifth Circuit properly followed the clearly erroneous standard of review as has been set forth by this Honorable Court in the cases cited hereinabove.

CONCLUSION:

For the foregoing reasons, Respondent prays that Petitioner's application for writ of certiorari be denied.

Respectfully submitted,

GANDY MICHENER SWINDLE
WHITAKER & PRATT
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102
(817) 335-4417

JOHN V. HOWARD
JOSEPH W. SPENCE
BRUCE W. McGEE

By:
BRUCE W. McGEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above named was forwarded by certified mail, return receipt requested, to Mr. Art Brender, 930 Capital National Bank Building, 110 West 7th Street, Fort Worth, Texas 76102 this 19th day of March, 1987.

BRUCE W. McGEE

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In the Supreme Court of the United States

OCTOBER TERM, 1986

CLARA WATSON, PETITIONER

v.

FORT WORTH BANK & TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

GLEN D. NAGER
Assistant to the Solicitor General

DAVID K. FLYNN
ROBERT DELAHUNTY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a plaintiff can state a cause of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. III) 2000e *et seq.*, based on an alleged disparate impact resulting from a subjective promotion practice or procedure.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-6139

CLARA WATSON, PETITIONER

v.

FORT WORTH BANK & TRUST

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States with respect to the first question presented by the petition.

STATEMENT

1. Petitioner, Clara Watson, is a black woman. She was hired in August 1973 by respondent, Fort Worth Bank & Trust, as a proof operator; in January 1976, she was promoted to the position of teller in respondent's motor bank; and, in February 1980, she was promoted to the position of commercial teller in the bank's main lobby (Pet. App. 4a). Over the course of the next year, however, petitioner applied unsuccessfully on four occasions for promotion to supervisory positions in the bank (*id.* at 4a-5a).[1] Accordingly, in August 1981, she re-

[1] First, petitioner applied for promotion to the position of supervisor of all tellers (Pet. App. 4a). Three other employees—one white male and two white females—also applied for the promotion (*ibid.*). Gary Shipp, a senior vice president of the bank and the

signed from her employment with respondent (*id.* at 5a).

2. In October 1981, after exhausting her administrative remedies, petitioner filed this Title VII action, 42 U.S.C. (& Supp. III) 2000e *et seq.*, alleging that respondent had discriminated against her and other blacks in hiring, evaluation, promotion, and various other employment decisions (Pet. App. 4a, 5c, 1d). On motion, the district court certified petitioner to represent a class consisting of all "blacks who applied to or were employed by [respondent] on or after October 21, 1979 or who may submit employment applications to [respondent] in the future" (*id.* at 2c). It then held a three-day trial concerning petitioner's discrimination claims on behalf of this class (*id.* at 1c-2c).

At trial, petitioner produced evidence showing that respondent had not had a black director or officer since 1975, that during this period respondent had employed only one black in any type of supervisory capacity at all, and that, during the period 1981-1983, blacks constituted approximately 13% of respondent's workforce (Pet.

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person to whom the supervisor of tellers reported, selected the white male, Richard Burt, for the promotion (*ibid.*). At the time, Burt was petitioner's supervisor (*ibid.*).

Second, petitioner applied for promotion to the position of supervisor of tellers in the motor bank (Pet. App. 5a). Six or seven other employees also applied for the promotion (*ibid.*). Burt, as supervisor of all tellers, selected Pat Cullar, a white female, for the promotion (*ibid.*; see also *id.* at 3c-4c).

Third, after Burt was further promoted to assistant vice-president, petitioner again applied for the position of supervisor of tellers (Pet. App. 5a). Three other employees—two white females and one black female—also applied for the promotion (*ibid.*). Burt, the new supervisor of the position, chose Cullar for this job as well (*ibid.*).

Fourth, with Cullar vacating the position of motor bank teller supervisor, petitioner again applied for that job (Pet. App. 5a). At least two other employees—a white male and a black female—also applied for the promotion (*ibid.*). Based on Cullar's recommendation, Burt selected Kevin Brown, the white male, for the job (*ibid.*).

App. 5c).[2] In addition, petitioner's expert testified, on the basis of applicant flow and other statistical data, that a black who applied for a job with respondent had one-fourth the chance of a white applicant to get the job; that a black employee's performance was apt to be evaluated more severely by respondent than a white employee's performance (and therefore blacks were paid approximately $46.00 less per month for comparable work); and that respondent advances blacks to greater responsibilities at a rate six-tenths of a pay grade per year more slowly than equally qualified white employees (*id.* at 19a, 21a-25a). Finally, petitioner recounted the events surrounding the promotions for which she had unsuccessfully applied (Tr. I6-I248).

Respondent countered with evidence showing that job openings were generally posted, that outside candidates were considered only if no existing employee was among the qualified applicants, that the individual who supervised a particular position made the initial employment decisions concerning that position—hiring, salary adjustment, promotion, etc.—in accordance with his or her best judgment, albeit guided by certain standardized criteria and subject to general review (though rare reversal) by the bank's highest officials (Pet. App. 7a, 14a-15a, 23a, 7c, 13c; Tr. II36-II37, II79-II84, II217-II219, II245-II249, III32-III33, III280-III283).[3] In addition, respondent produced evidence concerning the relative qualifications of the applicants to the four promotions for which petitioner had unsuccessfully applied and the reasons why peti-

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[2] Specifically, petitioner showed that respondent employed 68 whites and 9 blacks in 1981, 72 whites and 9 blacks in 1982, and 71 whites and 7 blacks in 1983 (Pet. App. 6a).

[3] The standardized criteria, as to which supervisors were required (at least for salary evaluation purposes) to assign point values, included accuracy of work, alertness, personal appearance, supervisor-co-worker relations, quantity of work, physical fitness, attendance, dependability, stability, ambition, friendliness, courtesy, job knowledge, and experience (supervisory or otherwise). See Pet. App. 23a n.26; Tr. III32-III45, III75-III76.

tioner had not been chosen for those positions (Pet. App. 4a-5a, 7a, 10a). Finally, respondent criticized petitioner's expert statistical evidence, noting that blacks comprised 11.8% of the county population, 10.2% of the metropolitan area population, and 22.8% of the city population, and that petitioner's applicant flow analysis did not account for the relative qualifications of the persons in the applicant pool (*id.* at 22a-23a).

On the basis of this evidence, the district court determined that it had erred in certifying petitioner to represent the class and, on the merits, rendered judgment for respondent (Pet. App. 5a-6a, 8c-16c). With respect to the certification issue, the court found (*id.* at 5a) that existing black employees (such as petitioner) did not share a common question of law or fact with non-employee applicants and that the existing employees formed too small a group to satisfy the "numerosity" requirement of Fed. R. Civ. P. 23(a). Accordingly, the court subdivided the class into applicants and employees and held that petitioner could not advance claims on behalf of either class (Pet. App. 5a). Then, with respect to the merits, the court held that, while a prima facie case of race discrimination had been established, petitioner had failed to demonstrate that respondent's articulated reasons for failing to promote her were pretextual (*id.* at 5a, 8c-10c) and that petitioner had presented "little or no evidence of discrimination" in any of respondent's promotion decisions (*id.* at 14c-15c).[14] Finally, it ruled

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[4] Specifically, the court held that respondent had credibly explained that Richard Burt and Pat Cullar, who were selected for the positions of supervisor of tellers and motor bank teller supervisor, respectively, were more qualified (because of greater experience and superior evaluations) than petitioner (Pet. App. 9c-10c). It further held that respondent had credibly explained that, while petitioner had more experience than Kevin Brown (who was promoted over petitioner to the position of motor bank teller supervisor), petitioner had difficulty getting along with co-workers and tellers and thus was not as good a candidate for promotion as was Kevin Brown (*id.* at 10c). Finally, the court noted that "[t]he evidence showed that[,] in addition to [petitioner], only one black,

that, although she was not a proper class representative, petitioner had "proceeded zealously on behalf of the group of blacks who applied for employment" and that, considering the pertinent statistical evidence, she had nevertheless failed to prove "discrimination against blacks as a class * * * on the basis of defendant's hiring practices" (*id.* at 16c).

3. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-26a). It rejected petitioner's argument that the district court had abused its discretion in decertifying the class and in holding that petitioner could not represent the class of black employees (*id.* at 6a-8a). It further rejected petitioner's argument that the district court's non-discrimination finding on the promotion issue was clearly erroneous (*id.* at 8a-10a). It agreed, however, that the hiring discrimination claims of the applicant class should have been dismissed without prejudice (since there was no proper class representative) and that a remand was necessary for this purpose (*id.* at 10a).

a. On the promotion issue, the court rejected petitioner's argument "that the district court erred in not applying disparate impact analysis to her claims of discrimination in promotion" (Pet. App. 8a). It said that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model" (*ibid.*) and that, having decertified petitioner's class-based challenge to respondent's "entirely subjective decisionmaking process" (*id.* at 6a (citation omitted)), the district court had properly treated petitioner's "claim as an individual disparate treatment claim" (*id.* at 8a). The court emphasized that "the plethora of statistics which [petitioner] introduced at trial" was still relevant to her allegations, both in "establishing a prima facie case of discrimination" and in "attempting to prove that

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Sylvia Harden, had applied for promotions which were given to whites" and that "Harden * * * did not allege that she has been discriminated against on that basis" (*id.* at 14c).

the reasons proffered by the [respondent] for its action[s] [were] either unworthy of credence or mere pretexts for discrimination" (*id.* at 9a). But the court found "no indication in the record, nor [was] there any suggestion * * * by [petitioner], * * * that the district court neglected to consider the statistical evidence presented by [petitioner] in terms of evaluating the credibility of the [respondent's] proffered explanations for its promotion decisions" (*id.* at 9a n.13).

b. Judge Goldberg dissented (Pet. App. 11a-25a). He agreed with petitioner that the district court had abused its discretion in decertifying the plaintiff class (*id.* at 11a-18a) and in failing to find that a pattern-and-practice of class-wide disparate treatment existed (*id.* at 19a-25a). He thus found "it unnecessary to decide whether [petitioner] could have proceeded under a disparate impact model as well" (*id.* at 19a), though he agreed that respondent's evaluation and promotion process does not "have much objective content" (*id.* at 23a n.26).

DISCUSSION

As noted in our petition for a writ of certiorari in *Tisch* v. *Shidaker*, No. 86-468 (filed Sept. 22, 1986),[5] copies of which are being provided to petitioner and respondent, the question whether a Title VII plaintiff can state a cause of action based on an alleged disparate impact arising from a subjective selection practice or procedure is a recurring and important one.[6] The courts of

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[5] On April 6, 1987, the Court granted our petition, vacated the judgment of the Seventh Circuit in that case, and remanded for further consideration in light of *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987).

[6] Among the issues deserving this Court's attention is the precise distinction between objective and subjective selection procedures. However that distinction might be drawn, which is an issue we will address if the Court grants certiorari, it is sufficient here to note our agreement with Professor Larson that selection processes which include both objective and subjective components must be considered subjective as a whole. See 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34, at 15-91 to 15-98 (1986). Where a mixed-component selection process is involved, of course, a plaintiff

appeals are badly divided over the correct resolution of this question and the conflict among them shows no sign of abating. Moreover, the application of disparate impact analysis to subjective decisionmaking processes is inconsistent with the Court's decisions and, by converting most if not all garden variety disparate treatment cases into disparate impact cases, undermines the delicate accommodation of policies that Congress made in Title VII. Accordingly, this Court's immediate review is warranted.

1. There is much confusion among the courts of appeals concerning whether a Title VII plaintiff can maintain a disparate impact cause of action without first identifying an objective employment practice or procedure that he or she alleges causes the adverse impact. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 1288 (2d ed. 1983). The Second and Fourth Circuits have held that disparate impact analysis does not apply in challenges to subjective decisionmaking processes. See, *e.g.*, *Rossini* v. *Ogilvy & Mather, Inc.*, 798 F.2d 590, 605 (2d Cir. 1986); *EEOC* v. *Federal Reserve Bank*, 698 F.2d 633, 638-639 (4th Cir. 1983), rev'd on other grounds *sub nom. Cooper* v. *Federal Reserve Bank*, 467 U.S. 867 (1984); *Stastny* v. *Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274 n.10 (4th Cir. 1980). The First Circuit has expressed grave con-

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can challenge an objective component of that process for its own disparate impact. See *Connecticut* v. *Teal*, 457 U.S. 440 (1982). Petitioner has not, however, attempted to do so in this case. Rather, petitioner seeks to challenge the selection process as a whole and agrees with respondent that that process is subjective. See Pet. 7-8; Br. in Opp. 6-10; see also Pet. App. 8a, 23a n.26.

We do not address in this brief the permissibility of a plaintiff pursuing a disparate impact claim directed at the bottom line results of a multi-step, but completely objective, decisionmaking process. Compare *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982) (suggesting that disparate impact theory never applies to multi-component systems, even if completely objective), with *Griffin* v. *Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985) (suggesting that disparate impact theory applies to all multi-component systems). That issue is not raised by the facts of this case.

cerns about the theory's applicability to subjective decisionmaking processes. See, *e.g.*, *Latino Unidos* v. *Secretary of HUD*, 41 Fair Empl. Prac. Cas. (BNA) 839, 848 (1st Cir. 1986); *Robinson* v. *Polaroid Corp.*, 732 F.2d 1010, 1015 (1st Cir. 1984). By contrast, the Sixth, Ninth, Eleventh, and District of Columbia Circuits have held that a disparate impact claim is cognizable even where an objective, facially neutral, employment practice has not been identified. See, *e.g.*, *Rowe* v. *Cleveland Pneumatic Co., Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982); *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1480-1486 (9th Cir. 1987) (en banc); *Griffin* v. *Carlin*, 755 F.2d 1516, 1524-1525 (11th Cir. 1985); *Segar* v. *Smith*, 738 F.2d 1249, 1270-1272, 1288 n.34 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985). The Courts of Appeals for the Fifth,[7] Seventh,[8] Eighth,[9]

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[7] Compare *Trevino* v. *Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987) (disparate impact analysis does not apply to subjective decisionmaking processes), and *Pouncy* v. *Prudential Insurance Co. of America*, 668 F.2d 795, 800-801 (5th Cir. 1982) (same), with *Page* v. *United States Industries, Inc.*, 726 F.2d 1038, 1045-1046 (5th Cir. 1984) (assessing lawfulness of a "subjective promotional system" under both disparate treatment and disparate impact analysis).

[8] Compare *Coates* v. *Johnson & Johnson Co.*, 756 F.2d 524, 530-531 n.4 (7th Cir. 1985) (no disparate impact claim where no "facially neutral" rules identified), with *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 450-451 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977) ("highly subjective and loosely structured" promotion practices subject to disparate impact theory), and *Regner* v. *City of Chicago*, 789 F.2d 534, 539 (7th Cir. 1986) (same).

[9] Compare *Taylor* v. *Teletype Corp.*, 648 F.2d 1129, 1132-1133 n.6 (8th Cir.), cert. denied, 454 U.S. 969 (1981) (disparate impact theory not available to challenge subjective decisionmaking process); *Harris* v. *Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) (same); and *Talley* v. *USPS*, 720 F.2d 505, 507 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984) (same), with *Gilbert* v. *City of Little Rock*, 722 F.2d 1390, 1397-1398 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984) (allowing plaintiff to use disparate impact theory without identifying an objective, facially neutral employment practice).

and Tenth [10] Circuits have found the issue so perplexing that panels within those circuits have reached conflicting answers.[11] This Court's intervention is needed to resolve the conflicts and to settle the confusion that presently exists among the courts of appeals.

2. On the merits, we submit that the court below correctly ruled that respondent's subjective promotion procedures may not be challenged on a disparate impact theory. To have ruled otherwise would have placed that court in conflict with this Court's decisions and would have undermined the policies that Congress sought to accomodate when it enacted Title VII.

a. When Congress enacted Title VII in 1964, it made clear that employers could no longer intentionally select among applicants and employees on the basis of race, sex, or certain other enumerated criteria (42 U.S.C. 2000e-2(a)(1)). Less clear, however, was whether employers could, in good faith and without the intent to discriminate, continue to use standardized tests and other mechanical devices for selecting among competing applicants and employees when the effect of using such devices is adverse to persons in one or more of the enumerated groups. See S. Rep. 91-1137, 91st Cong., 2d Sess. 4 (1970); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 706-712 (1968). For a number of reasons, employers often prefer to use objective rather than subjective selection procedures. Standardized selection devices are less expensive to administer; they generally produce more consistent and comparable results; and, by depriving personnel officers of discre-

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[10] Compare *Mortensen* v. *Callaway*, 672 F.2d 822, 824 (10th Cir. 1982) (plaintiff could not assert disparate impact claim since "she ha[d] not pointed to any employment practice that, neutral on its face, has caused women not to be promoted"), with *Bauer* v. *Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981) (applying disparate impact analysis to subjective hiring and promotion decisions).

[11] To our knowledge, the Third Circuit has not yet addressed the issue.

tionary authority, they help ensure that Title VII's proscription against intentional discrimination is obeyed by those with the greatest opportunity to engage in such discrimination. See Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1637-1638 (1969). Because it is difficult and expensive to fine-tune such objective devices so that they measure only qualities necessary to specific jobs, however, employers sometimes used tests and other specific qualifications that did not correspond with or measure what was necessary for competent performance and thereby disproportionately excluded members of certain minority groups from various employment opportunities. See *id.* at 1638-1649; see generally Blumrosen, *Strangers in Paradise*: Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 66-75 (1972).

It was against this background that the Court, in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), first approved disparate impact theory as a means of establishing unlawful employment discrimination. At issue in *Griggs* were written aptitude tests and a high school diploma requirement that the employer used as prerequisites to certain jobs. The Court found that the aptitude test and diploma requirement, while "neutral on their face, and even neutral in terms of intent," disproportionately excluded blacks from employment and yet had no "demonstrable relationship to successful performance of the jobs for which [they were] used" (*id.* at 430, 431). The Court determined that Congress had intended to achieve "the removal of [such] artificial, arbitrary, and unnecessary barriers to employment" when it enacted Title VII (*id.* at 431). While the Court did not believe that Title VII was meant to "preclude[] the use of testing or measuring procedures" (*id.* at 436), it did believe that "Congress ha[d] forbidden * * * giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job per-

formance" (*ibid.*). Thus, in response to the exclusionary problems associated with the use of nondiscretionary selection devices, the *Griggs* Court held that a prima facie Title VII violation could be stated from evidence that "practices, procedures, or tests neutral on their face" (*id.* at 430) have statistically significant adverse effects (*id.* at 431-432, 436).

Where objective, facially neutral, selection devices have been in issue, the Court since *Griggs* has continued to approve the use of disparate impact doctrine. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568 (1979) (anti-narcotics rule); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written examination). But where subjective selection devices have been in issue, and thus where the kind of exclusionary problems associated with nondiscretionary selection devices have not been present, the Court has declined to extend the disparate impact doctrine beyond the nondiscretionary selection devices and unique exclusionary problems that initially led to its adoption; instead, the Court has required Title VII plaintiffs to prove discriminatory motivation. See, *e.g.*, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978) (subjective hiring practices); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977) (same); *Teamsters* v. *United States*, 431 U.S. 324 (1977) (same); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) (subjective refusal to rehire). Indeed, the Court has specifically indicated that disparate impact theory was inapplicable in two cases where plaintiffs challenged subjective decisionmaking processes.

First, in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 805-807, the Court contrasted a discretionary decision not to rehire an individual who had participated in unlawful conduct directed against an employer with the type of mechanical decisionmaking processes that were in issue in *Griggs*. The Court noted that *Griggs* (411 U.S. at 806 (citation omitted)):

> dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood deficiencies in * * * education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. * * * [His employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification * * *. [His employer] assertedly rejected [him] for unlawful conduct * * * and * * * this cannot be thought the kind of "artificial, arbitrary, and unnecessary barrier to employment" which the Court found to be the intention of Congress to remove.

Thus, the Court in *McDonnell Douglas* vacated the decision of the lower court, holding that it had erred in applying the *Griggs* requirement of "job-relatedness" to the reasons given to justify the subjective refusal-to-rehire (411 U.S. at 805-806).

Second, in *Furnco Construction Corp.* v. *Waters*, *supra*, the Court expressly refused to apply disparate impact analysis to an employer's practice of hiring only those persons whom his superintendent knew were experienced or had been recommended. 438 U.S. at 572, 575. In doing so, it contrasted the selection device in issue there with "employment tests * * * or particularized requirements such as * * * height and weight specifications," as were involved in *Griggs*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (438 U.S. at 575 n.7).

The holdings in *Furnco* and *McDonnell Douglas* can be derived from the basic distinction between disparate impact and disparate treatment litigation. Accord, 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34, at 15-87 (1986). Disparate impact litigation challenges

"facially neutral" selection procedures—*i.e.*, employment practices that are mechanical in nature and that limit, segregate, or classify independently of operator bias or influence. See *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. Disparate treatment litigation challenges "discretionary" selection devices—*i.e.*, the use or application of non-mechanical, operator-dependent procedures or criteria. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802-806; *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. When an employer's decisionmaking process is in part discretionary or operator-dependent, "there is simply no 'neutral' factor involved. * * * [W]hat is going on is an ad hoc decision process in which a subjective judgment is being made about an individual" (3 A. Larson & L. Larson, *supra*, at 15-87 to 15-88). See also *id.* at 15-91 to 15-98; Note, *Evaluation of Subjective Selection Systems In Title VII Employment Discrimination Cases: A Misuse Of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 580-582 (1986). Thus, such subjective decisionmaking processes have been assessed only for their operators' motivation—the sine qua non of a disparate treatment case.[12]

b. In channelling Title VII litigation in this fashion, the Court has been especially sensitive to the different defenses that are applicable in disparate treatment and disparate impact actions. See *USPS Bd. of Govs.* v. *Aikens*, 460 U.S. 711, n.1 (1983); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252 n.5 (1981); *McDonnell Douglas Corp.* v. Green, 411 U.S. at 802 n.14, 806 n.21; accord, *Connecticut* v. *Teal*, 457 U.S.

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[12] Where subjective decisionmaking processes are involved, the question of discrimination is subject to traditional methods of proof. By contrast, where objective decisionmaking processes are involved, the problem is that prior societal discrimination has been incorporated (for perhaps non-discriminatory reasons) into the decisionmaking process; proof of discrimination, if any, can only be accomplished by non-traditional means. Thus, the distinction between the legal theories applicable in challenges to objective and subjective decisionmaking processes also corresponds to the nature of proof that is readily available for use in such challenges.

at 456-464 (Powell, J., dissenting). In a disparate treatment case, after a plaintiff establishes a basis for inferring discriminatory intent (by use of the *McDonnell Douglas* factors or by other circumstantial or statistical evidence), the employer is required to articulate the reasons it had for the action it took and, in that way, is given the chance to refute the inference that an improper discriminatory motive was at work in its decision. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. at 252-259. By contrast, in a disparate impact case, after a plaintiff establishes that there is a statistically significant disparity in the treatment of majority and minority workers, the employer must show that the device under challenge has a demonstrable relationship to successful job performance. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 425-426; *Washington* v. *Davis*, 426 U.S. 229, 246-252 (1976). Requiring employers to make this demonstration for subjective decisionmaking processes is impractical, however, and thus will undermine the myriad policies that Congress sought to accommodate when it enacted Title VII.

Establishing the necessary relation between the device under challenge and successful job performance is generally a complex, time-consuming, and expensive process. See generally Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 Sup. Ct. Rev. 17; Gwartney, Asher, Haworth & Haworth, *Statistics, the Law, And Title VII: An Economist's View*, 54 Notre Dame Law., 633 (1979). It generally requires the development of detailed and rigorous empirical proof concerning the predictive value of a particular selection device, the qualifications that bear a "manifest relation" to the successful performance of the job in question, and the correlation between the two. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 431-435; *Washington* v. *Davis*, 426 U.S. at 246-252. The industrial psychology profession has succeeded in validating or otherwise objectively substantiating a few objective selection devices. See, *e.g.*, *id.* at 248-252; *United States* v. *South Carolina*, 445

F. Supp. 1094 (D.S.C. 1977), aff'd without opinion *sub nom. National Educ. Ass'n* v. *South Carolina*, 434 U.S. 1026 (1978); *New York City Transit Authority* v. *Beazer*, 440 U.S. at 587 & n.31. But whatever the merits of requiring validation or other such rigorous proof for objective selection devices, subjective selection methods are not susceptible to such rigorous evaluative criteria and, practically speaking, may not be susceptible to validation or other such objective substantiation at all. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802, 806 n.21; 3 A. Larson & L. Larson, *supra*, at 15-85 to 15-86; Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 Nw. U.L. Rev. 776, 787-788 (1983).

As a practical matter, therefore, allowing plaintiffs to challenge subjective decisionmaking processes on a disparate impact theory will force employers either to replace those selection practices with objective ones or to eliminate any statistical disparities by using quotas. See Gold, *"Griggs" Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 459 (1985). But, as several members of this Court have warned, forcing employers to adopt objective selection practices or to adhere to racial quotas would be inconsistent with Title VII itself. See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting); *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 19-21 (Scalia, J., dissenting).

To begin with, Title VII "was not intended to 'diminish traditional management prerogatives'" (*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (citation omitted)). To the contrary, Congress made clear that "'management prerogatives[ ] and union freedoms [should] be left undisturbed to the greatest extent possible.'" *Steelworkers* v. *Weber*, 443 U.S. 193, 206 (1979), quoting H.R. Rep. 914, 88th Cong.,

1st Sess. Pt. 2, at 29 (1963). See also *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 16-18; *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986) slip op. 27-39. The Court has accordingly said that the Congress enacting Title VII viewed courts and federal bureaucrats as incompetent to evaluate whether particular selection practices are necessary or preferable and left employers with substantial discretion to experiment and innovate in the choice and use of selection methods. See *Furnco Construction Corp.* v. *Waters*, 438 U.S. at 578; *Steelworkers* v. *Weber*, 443 U.S. at 205-208; *Hishon* v. *King & Spaulding*, 467 U.S. 69, 79 (1984) (Powell, J., concurring); *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting). Thus, even assuming that objective selection criteria exist or can reasonably be derived for particular job categories,[13] interpreting Title VII to require the replacement of discretionary selection devices with objective ones would undermine the congressional preference for experimentation and innovation in selection methods that this Court has recognized.[14]

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[13] For many employment decisions, of course, especially those involving professional or managerial positions, such objective selection criteria simply do not exist. There is, for example, no objective method for choosing law firm partners, for selecting professors for tenure, or for appointing business managers. See Maltz, *Title VII and Upper Level Employment—A Response To Professor Bartholet*, 77 Nw. U. L. Rev. at 787-788. And even where objective selection methods arguably might be available, many businesses are too small to afford them or to make appropriate use of them. See Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 23.

[14] As one commentator has stated, requiring validation or a like-showing in cases involving subjective decisionmaking processes "would tend to have a chilling effect on all employers, big and small, discouraging badly needed experimentation and innovation in selection methods. * * * [S]uch a requirement would overstep the proper limits on government regulation in a free society, because it would impose a heavy legal burden on employers in the absence of any reason for believing that their procedures were harmful to the general public or unfair to any particular segment of it." Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, *supra*.

Likewise, Title VII cannot and should not be interpreted as requiring employers to institute preferential quotas to avoid Title VII liability. See *Steelworkers* v. *Weber*, 443 U.S. at 205-207; *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 27-39. While the Court has held that Title VII *permits* employers to engage in certain forms of voluntary affirmative action (see *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987); *Steelworkers* v. *Weber*, 443 U.S. 203), it has also recognized that Congress added Section 703(j) to Title VII [15] to assure congressional skeptics that the statute could not and would not be interpreted to "require employers or labor unions to use racial quotas or to grant preferential treatment to * * * avoid being charged with unlawful discrimination" (*Sheet Metal Workers* v. *EEOC*, slip op. 27). The congressional record is replete with comments "that employers would not be *required* to institute preferential quotas to avoid Title VII liability" (*Steelworkers* v. *Weber*, 443 U.S. at 207 n.7 (emphasis in original)). See *Sheet Metal Workers* v. *EEOC*, slip op. 27-39 (reviewing legislative history). But, since subjective decisionmaking processes cannot realistically be validated or otherwise shown to have a manifest necessity, applying disparate impact theory to them will "leave the employer with little choice * * * but to engage in a subjective quota system of employment," "far from the intent of Title VII" (*Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in

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[15] Section 703(j) provides (42 U.S.C. 2000e-(2)(j)) that "[n]othing contained in this subchapter shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer * * * in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section or other area."

the judgment). Accord, *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting); *Johnson* v. *Transportation Agency*, slip op. 19-21 (Scalia, J., dissenting).

This is not to suggest that anything in this Court's cases or the policies of Title VII would prohibit a Title VII plaintiff from using statistics to challenge the lawfulness of a subjective decisionmaking process. On the contrary, this Court has held that, in appropriate circumstances, a significant statistical disparity may fairly lead to an inference of intentional discrimination and thus constitute an important part of a prima facie case of disparate treatment. See *Hazelwood School Dist.* v. *United States*, 443 U.S. at 306-313; *Teamsters* v. *United States*, 431 U.S. at 335-336 n.15. In doing so, however, the Court has stressed (*id.* at 339-340 n.20 (emphasis added)) that:

> the statistical evidence [cannot be] offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. *Statistics showing racial or ethnic imbalance are probative in a case such as this one [involving subjective hiring practices] only because such imbalance is often a telltale sign of purposeful discrimination;* absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. *Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population.*

Implicit in this reasoning is the acknowledgment that Section 703(j) *does* bar imposition of liability in nonintent cases dealing with subjective practices merely because of a statistical imbalance. For, if a showing of statistical imbalance is sufficient to prove a violation where validation or other showing of manifest necessity

is not feasible, the very purpose of Section 703(j) would be defeated.

c. The Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. Pt. 1607, are, we believe, consistent with the conclusion advanced here. The Guidelines provide that the "use of any selection procedure which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory * * * *unless* the procedure has been validated * * * *or* the provisions of Section 6 [of the Guidelines] * * * are satisfied" (29 C.F.R. 1607.3A (emphasis added)). A "selection procedure" is defined to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q). Section 6 of the Guidelines goes on to state, however, that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines" (29 C.F.R. 1607.6B (emphasis added)), that such "circumstances" include the use of "informal or unscored selection procedure[s]" (29 C.F.R. 1607.6B(1)), and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (*ibid.*).

While the Guidelines do not expressly so state (and admittedly point in different directions at once), we believe that, in situations involving subjective selection devices, an employer justifies "continued use of the procedure in accord with Federal law" by setting forth legitimate, nondiscriminatory reasons for maintaining the selection procedure and for applying it in particular cases, as is required in disparate treatment cases. See 43 Fed. Reg. 38290, 38291 & n.17 (1978); 44 Fed. Reg. 11996, 12001-12002 (1979); see generally *McDonnell Douglas Corp.* v. *Green*, 411 U.S. at 802. Otherwise, the Guidelines would leave the employer with no possible defense

to a showing that its subjective decisionmaking process has an adverse impact and, as Section 6 indicates, the Guidelines were not intended, and should not be interpreted, to place the employer in such a dilemma (which itself would be inconsistent with the policies underlying Title VII). See *Albemarle Paper Co.* v. *Moody*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment); *Connecticut* v. *Teal*, 457 U.S. at 463-464 (Powell, J., dissenting).

3. In this case, of course, in addition to her disparate impact claim, petitioner raised a disparate treatment claim on which both the district court and the court of appeals found for respondent. The district court expressly found that respondent "met its burden of proof by presenting legitimate nondiscriminatory reasons for each employment decision" (Pet. App. 9c) and that there was "little or no evidence of discrimination" in respondent's promotion decisions (*id.* at 14c). The court below affirmed these findings, emphasizing that "[t]here is no indication in the record, nor is there any suggestion * * * by [petitioner] * * *, that the district court neglected to consider the statistical evidence presented by [petitioner] in terms of evaluating the credibility of [respondent's] proffered explanation for its promotion decisions" (*id.* at 9a n.13). In these circumstances, it makes no sense to allow petitioner to proceed against respondent on a disparate impact theory. She was refused "advancement * * * for [a] reason other than discrimination on account of * * * sex" and, accordingly, is not entitled to any relief under this statute (42 U.S.C. 2000e-5(g)).[16]

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[16] We note that, even assuming that she may proceed against respondent on a disparate impact theory, petitioner most probably could not make out a prima facie case of disparate impact in this case. Her sample size is so small that her statistics must be considered suspect on that basis alone. See *Teamsters* v. *United States*, 431 U.S. at 339-340 n.20; *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620-621 (1974). And the mere fact that there is an imbalance between percentages of blacks and whites in different levels of the workforce is not, without more, sufficient to state a prima facie case. See *Johnson* v. *Transportation Agency*, slip op. 13-15.

CONCLUSION

The petition for certiorari should be granted, limited to the first question presented.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

GLEN D. NAGER
Assistant to the Solicitor General

DAVID K. FLYNN
ROBERT DELAHUNTY
Attorneys

MAY 1987

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No. 86-6139

Supreme Court, U.S.
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SEP 23 1987
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARA B. WATSON,
Petitioner,

v.

FORT WORTH BANK & TRUST,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

ART BRENDER *
BRENDER, CASEY & COLOSI
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171
Counsel for petitioner

BRUCE MCGEE *
GANDY MICHENER SWINDLE WHITAKER & PRATT
2501 Parkview Drive
Suite 600
Fort Worth, Texas 76102
817/335-4417
Counsel for respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED DECEMBER 29, 1986
CERTIORARI GRANTED JUNE 22, 1987

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DOCKET ENTRIES IN THE COURTS BELOW

DATE	NR.	PROCEEDINGS
		UNITED STATES DISTRICT COURT
1981		
Oct 21	1.	ORIGINAL COMPLAINT—CLASS ACTION
Nov 9	5.	Defendant's Original ANSWER.
1982		
Jan 18	8.	Plaintiff's MOTION for Class Certification.
Jul 13	A	TRANSCRIPT OF Proceedings (Class Certification Hearing).
Aug 27	139.	Defendant's MOTION And MEMORANDUM of Authorities In Opposition To Class Certification.
1983		
Mar 4	217.	MEMORANDUM OPINION AND ORDER . . .
Apr 22	230.	Deft's MOTION and MEMORANDUM of Authorities for Reconsideration of the Court's Determination that a class action may be maintained or in the Alternative, Motion to Amend Order to Permit Interlocutory Appeal
May 2	253.	Plaintiff's RESPONSE In Memorandum of Authorities to Defendant's Motion For Reconsideration of Class Certification and Interlocutory Appeal.
Jun 16	262.	ORDER . . . that Deft's motion for reconsideration of the Court's determination of class action and, in the alternative, motion to amend order to permit interlocutory appeal are hereby DENIED.

DATE	NR.	PROCEEDINGS
1984		
Feb 21	266.	Defendant's MOTION and MEMORANDUM Of Authorities For Further Reconsideration Of The Court's Determination On The Class Certification
Mar 30	276.	Plaintiff's RESPONSE and MEMORANDUM Of Authorities to Plaintiff Second motion for Reconsideration of the Court's Determination on Class Certification.
Apr 2	283.	Filed *PRE TRIAL ORDER . . . conference held on March 27, 1984 . . .*
Apr 26	297.	ORDER . . . that the motion for further reconsideration of the class certification of the class certification be DENIED and that the class certification order of March 4, 1983 remain in effect. In so finding, the Court reiterates that such a holding is in no way a decition on the merits of plaintiff's claims.
Jul 9	317.	Filed MINUTE ORDER . . . non jury trial commences this day.
Jul 10	318.	Filed MINUTE ORDER . . . non jury trial continues.
Jul 11	319.	Filed MINUTE ORDER . . . non jury trial concludes this day.
Aug. 10	C	Filed TRANSCRIPT OF PROCEEDINGS— Vol. 1 thru III
Nov 21	393.	Filed MEMORANDUM OPINION . . .
Nov 30	409.	Plaintiff's Rule 59 MOTION For New Trial And For Additional Findings of Fact,
1985		
Jan 15		Filed ORDER . . . plaintiff filed a motion for a new trial and for additional findings of facts.

DATE	NR.	PROCEEDINGS
1985		
Feb 4		Filed NOTICE OF APPEAL (Pltf) from the final judgment entered on 11-20-84.
		UNITED STATES COURT OF APPEALS
1986		
8/27/86		Opinion of USCA-5
9/30/86		rehearing denied
		UNITED STATES DISTRICT COURT
Nov 4	467	ORDER (1) pursuant to a decision by the Fifth Circuit in Watson v. Fort Worth Bank & Trust, 798 F.2d 791 (5th Cir. 1986), this Court vacates that portion of its opinion which states that the claims of the applicants for positions at the Fort Worth Bank and Trust are not meritorious. The applicants' claims are hereby dismissed without prejudice.
Nov 14	43	MOTION FOR RECONSIDERATION,
Dec 17	44	ORDER
1987		
Jul 24	47	487 JOINT STIPULATION OF PARTIES TO CORRECTNESS OF COPIES OF EXHIBITS LOST FROM RECORD

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA4-81-581-E

CLARA WATSON

vs.

FORT WORTH BANK & TRUST

TRANSCRIPTS OF PROCEEDINGS

[I Tr. of Trial 6:]

* * * *

CLARA B. WATSON,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BRENDER:

Q. Will you state your name for the Court?
A. Clara B. Watson.
Q. And whereabouts do you live, Mrs. Watson?
A. 6729 Westcreek Drive, Fort Worth, Texas.
Q. How long have you lived at that address?
A. A year.
Q. All right. And how are you employed, ma'am?
A. I'm employed by American Airlines.
Q. And in what capacity?
A. Lead service clerk.

* * * *

[I Tr. of Trial 11-13:]

* * * *

Q. Okay. All right. Now, when you—how did you first come to apply for a position at the Fort Worth Bank & Trust?

A. I just decided to look in the telephone directory and get, you know, a bank.

Q. All right. You decided you wanted to get in the banking world?

A. Yes.

Q. And you applied for a teller position?

A. Yes.

Q. Were you hired?

A. Yes, I was hired.

Q. As a teller?

A. No.

Q. Well, what—what position?

A. Proof operator.

Q. What did the proof operator do?

A. We would balance the account—your deposits that a customer would bring in, we would balance it toward their statement. You know, if they said $300, we would run it through the computer to verify such, and any cancelled checks that were cashed we would run all these items through the transit machine.

Q. Okay. And you say "we." How many people were doing that job at the bank at that point?

A. There were approximately three operators at that time.

Q. All right. Where was the proof operation? What part of the bank was it—

A. It was located in the building behind the tellers' counter.

Q. Okay.

A. The main lobby of the bank.

Q. All right. And was it in a place that was visible to the bank customers?

A. No, it was behind a wall.

Q. All right. When you went to work for the bank in August of '73, how many blacks approximately were working for the bank at that time?

A. Approximately four.

Q. And besides yourself, who would that be?

A. It would have been Irma Wright, Thelma Gibbs and Bobbie Washington and, there was Leroy—I can't remember his last name. He was a porter.

Q. He was a porter?

A. Uh-huh.

Q. What did the other three women do that you just mentioned? What were their jobs?

A. Bobbie Washington was the kitchen attendant, and Thelma Gibbs and Irma Wright, they were check printers in the basement.

Q. What was their job, to print the checks?

A. Print the checks and deposit slips.

Q. All right. They didn't have any customer contact?

A. No.

Q. And neither did you in your job as a proof operator.

A. No.

• • • •

[I Tr. of Trial 14:]

• • • •

Q. Then what job did you get?

A. Teller trainee.

Q. All right. And how did you happen to come by and receive that teller trainee job?

A. Well, I had expressed my desires to Gary, Gary Shipp on several occasions that I wanted to be a teller, and every chance I got I'd go to him and ask if I could be a teller, you know, and I didn't acquire the job until there was a, a black that worked there that went to EEOC that filed a complaint concerning discrimination, and I still expressed the desires to be moved and I was moved right after that.

• • • •

[I Tr. of Trial 18-19:]

• • • •

Q. All right. Did—had you been asking to be a teller at that time?

A. I was.

Q. Prior to—

A. I had asked to be a teller at that time.

Q. And did you know why at that time you had not been made a teller?

A. Well, Gary told me, you know, we had conversations about that and he told me that it was a big responsibility and it was a lot of money and he said that, you know, "I don't know, girl, it's just a big responsibility," and he said, "It's a lot of money, you know, for blacks to have to count."

• • • •

[I. Tr. of Trial 23:]

• • • •

A. Yes.

Q. Had there ever been a black teller at the bank before?

A. No.

Q. All right. And where were you working? Where within the bank were you working initially?

A. As a trainee, I worked in the lobby. And after I completed training, I went to the motor bank, the drive-in is what they called it during that time.

Q. Okay. And that's where the automobiles would come into the—

A. That's correct.

Q. Through the pneumatic operation of the bank?

A. Yes.

Q. Okay. Now, how long did you—were you a—an employee and how long did you remain in this job as a teller?

A. Well, I was—I guess you would say until '81. I was still a teller and assistant to Richard Burt.

Q. Okay. What was your—let me ask you this: Did you receive during the time you were at the bank periodic salary increases?

A. Yes.

Q. How were those determined?

A. Evalua—well, the latter part was evaluations.

• • • •

[I Tr. of Trial 25-27:]

• • • •

Q. Okay. But prior to '78, there were always oral reviews; there was never a written—

A. Yeah, it was oral.

Q. Okay. And how was the amount of the salary increase determined prior to '78, if you got a salary increase?

A. How was it determined?

Q. Uh-huh. Do you know what the standard was or what did this oral review consist of? What did they tell you at the oral review?

A. Well, they would tell us about our outages. You know, "You have very few outages this time and you have done a good job. The customers are happy with you and, you know, you have been to work promptly," you know, or something to that nature.

Q. And outages are what? Are those shortages?

A. Shortages, on, you know, on your money box.

Q. Okay. And would they tell you how much of a salary increase you were going to get?

A. Yes.

Q. Prior to '78, approximately what was that on a yearly basis?

A. Well, it wasn't percentage-wise. It was always told to me you are going to get $15, $20 raise, you know, per month.

Q. Something like that?

A. Yes. I didn't get any percent.

Q. Okay. Now, in '78, there was a procedure whereby there was a written review; is that correct?

A. Yes.

Q. And then based on the number of points you got, you were awarded a certain percentage increase in salary, as I understand it; is that correct?

A. That was the way it was explained to me.

Q. Okay. And how often were the reviews after '78 once they were written reviews?

A. Once a year.

Q. All right. And you left the bank, resigned in 1981; is that correct?

A. That's correct.

Q. How many reviews, or these written reviews did you have?

A. Two.

Q. Okay. And who was the supervisor that performed those?

A. One was Gail Leavitt. The other was Brian England.

Q. Okay. And each of them were approved by Mr. Shipp; is that correct?

A. That's correct.

Q. At the time that you left the bank, had there ever been—During the period of time that you were at the bank, let me put it that way, from that—during that about eight-year period, was there ever a black supervisor—

A. No.

Q. —at the bank?

So, the people who were filling out the reviews and doing the reviews, be they oral or written, were all white; is that correct?

A. That's correct.

Q. Were there any blacks in management of the bank at all?

A. No.

Q. Were there any black loan ficers?

A. No.

Q. Or any of the president, vice president, none of those people were black; is that correct?

A. No.

Q. To your knowledge, were there any blacks on the Board of Directors?

A. To my knowledge, no.

• • • •

[I Tr. of Trial 32-33:]

Q. Okay. Clara, we were referring to this portion where it says, "This is a performance evaluation rating," and it was 72 scatched out and a 70 placed there; is that right?

A. That's right.

Q. And then the increase appears to have been written over and the percentage appears to have been written over, too; is that corrct?

A. That's correct.

Q. And when you look down at the evaluation, the 8 percent is circled and then the 7 percent is circled; is that right?

A. That's correct.

Q. And when you look down to the increase award it has a 7 percent increase which totals $45; is that right?

A. That's correct.

Q. Okay. Now, was that the award—was that the pay increase that you received in that evaluation, $45 apparently a month?

A. That's correct.

Q. All right. But it had been reduced from 7 percent to 8 percent from the point in time when your supervisor first marked the sheet; is that correct?

A. Yes.

Q. All right. And who was your supervisor at that point?

A. Gail Leavitt.

Q. And is that a male or female?

A. Female.

Q. And when she had evaluated you, you had 72 points, which would have given you an 8 percent raise; is that correct?

A. That's correct.

Q. Who made the decision to lower, first of all, the friendliness and courtesy rating on page 5 of the evaluation so as to decrease your raise by one percentage point?

A. Gary Shipp.

Q. All right. And is his signature the one that is on the bottom of this Nonofficer Salary Review worksheet?

A. Yes, that's correct.

Q. All right. To your knowledge, are officers at the bank rated on a type of a scale?

A. No, sir, not to my knowledge.

Q. All right. Now, were you aware of whether or not Mr. Shipp on a regular basis rated employees down or took over the—or changed the rating of the supervisors?

A. Well, my supervisor informed me that he did.

• • • •

[I Tr. of Trial 36-37:]

• • • •

Q. All right. Now, in 1980 you mentioned two jobs that opened up and I would like for to you describe briefly for the Court what each of those jobs entailed?

A. Okay. The job at the motor bank was the supervisor's job over the motor bank tellers, and you would have supervision over your employees that worked there; and you would okay checks, the ones that, you know, needed your initial on them, check the money shipments, see that the vault was locked. You know, just general overall supervision of the employees there.

Q. All right. Did you—would you also have responsibility, for instance, of rating or evaluating those employees?

A. Yes, yes, you would.

Q. All right.

A. And you would also, if there was anyone to be hired, you would visit with them, you know.

Q. All right. You would make at least some interview of the person; is that correct?

A. Yes. You wouldn't have the final say but you would have an interview with them.

Q. Who had the final say in hiring the people at the bank?

A. Gary Shipp.

Q. All right. Now, what was the other position, the lobby supervisor?

A. The lobby supervisor, you would be supervising the lobby tellers; also have control over the vault, checking the money shipment and seeing that, you know, all the tellers balanced, okaying checks that were, you know, out of the ordinary, and you would also have supervision over the motor bank position, you know, the teller. I mean, the supervisor. I'm sorry.

Q. So, the supervisor at the motor bank reported to the supervisor of the lobby?

A. Of the lobby, yes.

Q. Okay. And who did the supervisor in the lobby report to?

A. Gary Shipp.

• • • •

[I Tr. of Trial 39-40:]

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Q. All right. And to whom did you apply for these positions?

A. I went to Gary Shipp personally.

Q. And you asked him to be considered for each of those jobs; is that correct?

A. Yes.

Q. What did he tell you?

A. Well, he said that he would put my name in the running.

Q. All right.

A. That's what he said.

Q. Did he inform you as to who else was in the running?

A. No.

Q. Okay.

A. Huh-uh.

Q. And was there anything that indicated, anything in writing that you ever saw, that indicated what qualifications were necessary for those particular jobs?

A. No, no.

Q. All right. Did you get either of those two promotions or were you promoted to either of those two jobs—

A. No.

Q. —in February of 1980?

A. No.

Q. All right. Who received the lobby supervisor's job?

A. Richard Burt.

Q. And who received the motor bank supervisor's job?

A. Pat Cullar.

* * * *

[I Tr. of Trial 41-43:]

* * * *

Q. All right. Now, did you know each of them? Were they employees of the bank at the time?

A. Yes.

Q. All right. And what had Richard Burt's job been prior to the job as a lobby supervisor?

A. He had been—

THE COURT: I thought he was the motor bank.

MR. BRENDER: No, excuse me, Your Honor. Richard Burt was the lobby and Pat Cullar was the motor bank.

THE COURT: All right.

THE WITNESS: He had been bookkeeping supervisor.

BY MR. BRENDER:

Q. All right. And prior to that, what job had he done at the bank?

A. Prior to that, he was in accounting and previous to that he was a teller, started out as a teller/trainee.

Q. All right. And when did you start as a teller trainee?

A. I can't give you the exact year, but it was in the '70s.

Q. Okay. And was it after you were, had been made a teller?

A. Yes.

Q. And did you assist him or train him in any way when he first came on board?

A. Yes. He worked in the motor bank and I, along with a few others, you know, trained him.

Q. When he first came to work there; is that correct?

A. Yes.

Q. How old a fellow was he when he came to work there?

A. Approximately 20. Maybe—about 20 years old, I believe. I am not really sure.

Q. All right. And he was a white male; is that correct?

A. That's correct.

Q. All right. And Pat Culler, who was a white female; is that correct?

A. Yes.

Q. And she got the motor bank supervisor job; is that correct?

A. Yes.

Q. How long had she been at the bank at the time?

A. I believe prior to her making motor bank supervisor, I believe she had been there three, about three years, almost three years. Somewhere in there.

Q. Okay. And at the time—at this time in 1980 you had been there approximately seven years; is that correct?

A. Yes.

Q. Okay. What had Pat Culler's job been with the bank prior to her getting the motor bank supervisor job?

A. She was a commercial teller.

Q. All right. And where did she work, inside?

A. The lobby.

Q. In the lobby?

A. Yes.

Q. All right. Had she—what had she done prior to that, if anything? In other words, did she have the same job the whole three years or had she had any other job at the bank?

A. I believe she had the same job.

Q. All right. Had she ever been out in the motor bank, to your knowledge?

A. One Saturday a month, if that many.

Q. But that was not her regular position?

A. No, no. It was extra.

* * * *

[I Tr. of Trial 44-47:]

* * * *

Q. All right. Had Pat Culler, to your knowledge, while she was at the bank, been in a supervisory position before she was advanced to this position?

A. Not to my knowledge.

Q. All right. Then did you—after that, this being in February or so of '80, you then became an inside teller; is that correct?

A. I came inside—I believe I came inside in '79, the latter part of '79.

Q. Okay. So this was prior to the motor bank job becoming available?

A. Uh-huh.

Q. Okay. Was that any kind of promotion when you went from the teller outside or what we call the outside teller to the inside?

A. No.

Q. That didn't involve any kind of promotion or anything?

A. No.

Q. All right. Or at least any increase in pay, I take it.

A. No.

Q. All right. Now following, then, the new supervisory jobs, what duties did you assume with regard to Mr. Burt while he was then the inside teller supervisor?

A. Well, when the memo came out that Richard was named as the supervisor, well, Richard told me that Gary wanted to see me, and Richard and I and Gary Shipp were in his office and he told me that Gary—

Q. You've got two of them.

Okay. Who?

A. Gary. Gary said that, you know, he was sorry that I didn't, you know, get that position but there's another position that he was hoping that I would be interested in. And I asked him, you know, "Which one?" And he said, "Well, how would you like to be Richard's assistant?"

And I asked him, I said, "well, his assistant, does this mean, you know, that I would be assistant supervisor of, you know, or just what would it mean? What would I have to do?"

And he said, yes, that it means that I was assistant, assistant to the supervisor. Richard was the supervisor. And he left and told Richard, "You can go into detail and explain her duties."

Q. All right. And this was right after the promotions had been made in the supervisors' jobs?

A. Yes.

Q. Did this assistant position that he was describing to you, did it carry or entail any kind of increase in pay?

A. He didn't tell me that it did at the time.

Q. Did you get an increase in pay?

A. I believe I did eventually.

Q. Eventually. Not right away?

A. No.

Q. Okay. By "eventually," you mean, though, sometime prior to your annual review?

A. Yes.

Q. Okay. Now, what, then—how did your job differ, then, after you became the supervisor of the—or the assistant to the supervisor of the inside lobby? What duties did you have then that you didn't have before?

A. Well, I had assumed quite a few of Richard's duties from his desk, and I also had—he let me assign out the work to the tellers that was inside and I could schedule the relief for Bobbie like from the teller, every teller had to relieve her from lunch at one point in time. And I could okay checks, like large-item checks, or customers that came in that had a problem with a draft or to that nature. And I would stay and help the tellers with their outages. Those were part of the duties.

Q. All right. I want you to look briefly at Plaintiff's Exhibit 4 that we introduced there; the first page, the one that has the last figure, which is your employment file.

It has employment history. It has the department you worked in, the rate of pay, the dates.

It appears that your reviews, that you had a review 8-1 of '79 which we have looked at where you were rated and given a $45 a month increase.

Then if you look right under that it has 2-80. It has position, commercial teller, department teller, and has a $45 a month increase.

Is that correct?

A. That's correct.

* * * *

[I Tr. of Trial 48:]

* * * *

Q. All right.

A. Looking at the 2-80, I became a commercial teller inside also, along with assuming the duties with Richard Burt.

Q. Okay.
A. And I got a raise.

* * * *

[I Tr. for Trial 50-51:]

* * * *

Q. All right. Now, did you—how long did you serve, then, in this capacity as both a commercial teller and as an assistant to Richard Burt?
A. Until January of '81.
Q. Okay. What happened in January of '81?
A. Well, I went out on surgery. I had left the bank to go out, you know, to have foot surgery.
Q. All right. When had—when did you have the foot surgery?
A. I had the foot surgery January, '81.
Q. Okay. When you say you left the bank, you didn't leave your employment?
A. No, I didn't quit. I just, you know, took a leave, sick leave.

* * * *

[I Tr. of Trial 56-62:]

* * * *

Q. Now, in January of 1981, two more jobs opened up, did they not?
A. Yes.
Q. All right. And what two jobs opened that you were seeking?
A. The same two jobs.
Q. The exact same two jobs?
A. Yes.
Q. All right. And how did that happen? Richard Burt was in the one job. Did he leave the bank or did he move up, or what was his—
A. He got a promotion. He moved up.
Q. To what job?
A. I believe he was made vice-president or to that nature.

Q. All right. And then what about the other job, the motor bank supervisor job? How did it open up?

A. When they made a decision on Richard's job, they made a decision on his job first.

Q. I see.

A. And when they made that decision, well, that was Pat Cullar. So she came inside and that left her job open.

Q. I see. Okay. So the first job to open up was the same job that was opened up almost a year before?

A. Yes.

Q. And that was the insider or lobby supervisor position?

A. Yes.

Q. And did you apply for that job?

A. Yes.

Q. And to whom did you apply?

A. To Gary Shipp.

Q. And was this oral or in writing?

A. Oral.

Q. And what—did he say anything to you or did he mention—

A. Same thing; they would put me in the running.

Q. Okay. Did you know who else had applied for that job?

A. Sylvia Hardin had.

Q. All right. Anybody else?

A. Mildred Daw had mentioned that she was. I didn't know anything definite. She had said that she was going to.

Q. All right. Anybody else that you were aware of?

A. You're talking about Richard's job; right?

Q. Yes.

A. Pat Cullar, you know, she had applied.

Q. All right. And who got that position?

A. Pat Cullar.

Q. And after she got—And who announced that she received that position? Do you know?

A. Richard called me at home and told me. I got a phone call.

Q. All right. And had the decision to promote Pat Cullar, once again, had that been made by Gary Shipp?

A. Yes.

Q. All right. And then Richard Burt called you and told you about it; is that right?

A. Yes.

Q. And what, if anything, did he tell you about how the decision had been made or whatever?

A. Well, he called me and said, "Hello, Clara" And I was at home and he said, "I just wanted to let you know, about the job and who got the position," and he said, "Pat Cullar got the job," and I got a little upset with him and I asked him, "Well, why?" You know, "Why did she get the job when I was his assistant and I had worked real close with him?" And he said, "Well, you know, she's better suited for the job."

Q. That was the only explanation you received?

A. Uh-huh.

Q. Did you have a discussion with Gary Shipp about the same matter about why she got the job and you hadn't?

A. Yes.

Q. When was that?

A. I called him on the phone the same day.

Q. This was while you were at home recuperating—

A. Yes.

Q. —from the surgery?

A. Yes.

Q. All right. And what did he tell you?

A. He stated the same thing, that she was, you know, better suited for the job.

Q. Okay. Now, you had had more experience at the bank than she had; you'd been there longer?

A. Yes. And I expressed all those ideas to Gary and to Richard.

Q. All right. Now, was there any mention made at that point then of her job, of the fact that job was open?

A. Yes. In fact, Richard told me earlier that day when I talked to him that, you know, since she's got that

job, that I could apply. He said, "You can apply for the motor bank supervisor."

Q. Okay.

A. And he said, "We'll make that decision in a few days."

And I told him, "well, I'll have to think about it," at that point.

Q. Why did you tell him that?

A. Because I felt that I wasn't going to receive that position, either. You know, I had applied and been unsuccessful; never received anything before.

Q. All right.

A. So I told him, "I'll think about it."

Q. All right.

A. And I called Gary and this is what he told me, that Pat was better suited for the job, you know; and like I told him, "I just don't understand, you know, how can she be better suited? What, you know, what was the classification, you know, of being suited, you know, for the job?"

And he just said, "Well, girl, you know, the other job's opening up over at the motor bank and if you're interested," he said, "I'll drop your name in the hat." Those were his words.

Q. And what did you tell him?

A. And I told him, "I don't know. I am not sure." I said, "I'll call you back later today and let you know."

Q. And what did you do?

A. I thought about it, and then after the bank closed, well, I called Richard and I told him that I was interested.

Q. By "the bank closed, "you mean after 2:00 o'clock?

A. After 2:00 o'clock, yes.

Q. And you told Richard you were interested in the motor bank supervisor job?

A. Yes.

Q. Did you then call Gary Shipp and tell him the same thing?

A. He said that he would tell Gary. Gary was out of the bank.

Q. Okay. And then was there a decision made on the motor bank supervisor job?

A. Yes. There was a decision made on that.

Q. When was that made?

A. A few days, you know, later on. I can't really tell you how many days it was, but it was a few days.

Q. Were you still recuperating from this foot surgery at that time?

A. Yes.

Q. Who was then given the motor bank supervisor job?

A. Kevin Brown.

Q. And Kevin Brown is a white male?

A. Yes.

Q. And the Pat Cullar that got Richard Burt's job is the same Pat Cullar who was the white female we talked about a little earlier?

A. That's correct.

Q. And did you know Kevin Brown?

A. Well, I knew him from working, you know, at the drive-in. He was a part-time employee.

Q. All right. About how long had you worked at the bank when he got the motor bank supervisor job?

A. Part-time, I think he had worked about approximately a year. That's just guessing, you know. It's not anything—About a year, I believe, as part time.

Q. All right. How long had he been full time, a full-time employee with the bank?

A. Only a few months.

Q. All right. How old a fellow was Kevin?

A. Kevin?

I don't know. 19 to twenty-ish, somewhere.

Q. All right.

A. He was young.

Q. And how many employees was he then supervising as a motor bank supervisor?

A. Let's see. Approximately seven, I believe.

Q. All right. And had he done any supervision of anybody there at the bank prior to that?

A. No.

Q. His job had been what?

A. Teller.

Q. Okay. And by part-time, what would he work?

A. He worked afternoons; come in at 2:00 o'clock and got off at 6:00, closing.

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[I Tr. of Trial 73-74:]

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Q. All right. And following this, by the way, you had some more foot problems that necessitated some additional surgery, did you not?

A. That is correct.

Q. And when did you have the additional surgery?

A. A few weks after that decision was made, I had another surgery.

Q. All right. And then you were out with this foot problem until sometime in August of '81; is that corect?

A. That's correct.

Q. All right. And during that time, was the bank paying you a salary?

A. N-

Q. A.. right. And you—the foot problem had begun when you had fallen, I believe, on the job, had it not?

A. Yes.

Q. And you were receiving worker's compensation, were you not?

A. That's correct.

Q. All right. And that paid a portion, up to two-thirds of your salary, I believe is what the law requires; is that correct?

A. That's correct.

Q. All right. In August of '81, what action did you take with regard to the bank?

A. In reference to—

Q. Did you resign your position with the bank?

A. Oh, in August of—Yes, I did. In fact, it was August 10th, '81, I—

• • • •

[I Tr. of Trial 96-97:]

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Q. All right. Well, then, let's just talk about it in terms of when you were there.

The jobs in which—There are—how many floors, by the way, does the bank take at the present building that they are presently occuping or did it at that time?

A. At that time, there were three floors.

Q. Three floors?

A. Yes.

Q. All right. And what would they be?

A. The third floor was the executive floor, the president's office, and the second floor was the main lobby area.

Q. All right.

A. And the lower floor was where the vault and safety deposit, bookkeeping, the lunchroom and the restrooms.

Q. All right. Did blacks occupy any positions up on the third floor in those jobs that had to do with the executive offices, be they secretary or anything of that sort?

A. No.

Q. What about the second floor in the lobby area?

A. There was, yes, yes.

Q. All right. And what about on the third floor in the basement area?

A. Yes.

• • • •

[I Tr. of Trial 98:]

Q. Did you ever seek a transfer? Do you know what I mean by "transfer?"

A. Well, I worked at the motor bank and I tried to transfer into the lobby, and it took quite a while to get in there.

Q. Okay. Do you know whether or not that there were other—when you were trying to seek a transfer to the lobby, were there any blacks that were working in the lobby at that time?

A. No.

Q. All right. Do you know whether or not it was harder for blacks to get into the lobby or transfer to those positions than whites?

A. I believe so, because there were whites that were in there that worked at the drive-in.

Q. All right. And they were transferred while you were seeking a transfer and you were not?

A. Yes.

Q. Did you have more—Who specifically are we talking about?

A. Linda Schell was one that worked at the drive-in.

Q. Did you have more seniority than she did?

A. Yes.

Q. All right. Now, were there ever—With regard to that transfer policy, who would be responsible for making those decisions?

A. The supervisor and Gary Shipp.

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CROSS EXAMINATION BY MR. McGEE

[I Tr. of Trial 113-16:]

* * * *

Q. Okay. In your previous testimony and in your complaint before this Court, you've made allegations to the effect that the bank has discriminated against you in a number of different ways, including placement in the bank.

Did you consider your initial placement in the proof department as a proof operator to be a discriminatory act by the bank?

A. Did I consider it to be discriminatory?

Q. Yes, ma'am.

A. Being placed or working as—

Q. Well, initially being placed as a proof operator, did you consider that to be discriminatory?

A. Being placed—I did, being placed in the back when I initially applied for teller trainee with customer contact.

Q. Excuse me. Do you know if any teller positions were open when you made your initial—

A. I am not sure.

Q. Why is it that you consider that the location of the proof department was discriminatory against you?

A. It was noncustomer contact.

Q. Were there white people working in these jobs?

A. Yes, there were several.

Q. And this was in the old bank on Nashville Street?

A. Yes.

Q. All right. In approximately a year to two years, you were granted a promotion to teller and you went into the—did you go into the motor bank immediately?

A. I worked in the lobby from two to three months, training.

Q. While you were training?

A. (Nods head.)

Q. While you were there, did the bank do anything to shield you from public contact as a teller?

A. I don't understand your question.

Q. Well, did the bank—the bank or any of its employees, take any action to keep you from having contact with the customers while you were training there in the lobby?

A. No.

Q. Okay. You stood where the rest of the tellers stood and performed substantially the same functions that they did, did you not?

A. No, I didn't. I stood behind the teller that was—I watched.

Q. All right. Was that part of the training?

A. Yes, I assume so.

Q. All right. Did you eventually have your own window or stand in the window for a period of time?

A. On Fridays, 4 to 6.

Q. And you had contact with the public at that time, did you not?

A. Yes.

Q. There were customers who came in the bank who were both black and white, were there not?

A. Yes.

Q. Okay. After your initial training period, you testified that you were placed in the motor bank.

Did you consider that placement to be discriminatory?

A. Placed in the motor bank?

Q. Yes, ma'am.

A. No.

Q. All right. Was the motor bank an acceptable place of work, so far as you were concerned?

A. It was public contact.

Q. Okay. Was your job in the motor bank substantially the same as other tellers in the motor bank?

A. Yes.

* * * *

[I Tr. of Trial 117:]

* * * *

Q. And do you remember about how long it was after your initial hire that Mr. Shipp came to the bank?

A. He came about—I am estimating—about two-and-a-half to three years, I believe.

Q. Okay. So Mr. Shipp had nothing to do with your initial placement in the proof department or anything that had to do with your hire at the Fort Worth Bank & Trust, or State Bank of East Fort Worth as it was known then; is that true?

A. That's true.

* * * *

[I Tr. of Trial 120:]

* * * *

Q. All right. You've made mention a couple times about that fact Mr. Shipp referred to you as "girl."

Do you consider that to be some sort of racial slur?

A. No, I don't consider it to be a racial slur. I just consider it as being very inconsiderate of not wanting to learn a person's first name.

• • • •

[I Tr. of Trial 124-26:]

Q. You did receive a pay increase when you were promoted to teller, did you not?

A. I don't remember.

Q. Well, do you remember that you did not or do you remember—or you just don't remember at all?

A. I don't remember if I—if I received one immediately. From the notice that, you know, I have seen it indicated that I did.

Q. Okay. But you don't have any reason to think those notes are incorrect, do you?

A. Well, I didn't give it any thought.

Q. You did receive periodic increases in your salary while you served as a teller, did you not?

A. I believe I got a raise once a year, and then there was an instance where I got a raise two times in one year, and I believe that year was '79.

Q. Okay. Was that a merit raise given to you because of some particularly good work you had done?

A. I made a commercial teller.

Q. Was that the raise that you testified to, then, about a $45 raise and that was, I believe, in February of '80?

A. Yes.

Q. All other times while you were a teller, or as far as that goes, while you were employed by the bank did you receive the normal reviews, and if you were entitled to an increase, an increase at that time?

A. I received once a year verbal reviews.

Q. And did you receive increases as a result of those reviews?

A. Yes, I got a small amount, yes.

Q. All right. Were you complaining about the amount of the increase that you received?

A. Yes.

Q. Okay. Herefore, Ms. Watson, I believe you testified that you didn't have any complaints about the salary that was paid to you other than you thought that you were paid less than some white employees, but that you basically feel like that you were treated fairly as with regard to your salary and increases that were given you. Is that no longer your testimony?

A. That's still my testimony.

I also state just what I have stated a minute ago, that I did get small amounts of increases.

Q. Maybe I'm not following you then. Are you just saying that you would have liked to have received more?

A. I would have loved to have received more; that is all I am saying.

Q. I understand that without any problem.

Do you feel like these small increases were a result of your race, or just as a result of the fact that the employer didn't give as large a raise as you would have liked to have received?

A. Well, in my opinion, in that case I really didn't sit down to analyze it, you know, either way.

* * * *

[I Tr. of Trial 127:]

* * * *

Q. So far as you could tell, Mrs. Watson, did the bank review its white employes or its nonblack employees in the same fashion that it reviewed the black employees at that time?

A. I can only speak—I don't know. I guess so. I assume so. I don't know.

Q. You have no knowledge or indication they were treated any different, do you?

A. No.

* * * *

[I Tr. of Trial 128:]

Q. All right. Then in '78 or '79 when the bank instituted the formal written evaluations, did you view that as any form of discriminatory practice against black employees?

A. On the questions, no, I didn't view that as discriminatory, but the answers, yes. The opinions, yes.

Q. The opinions expressed by the supervisors?

A. Yes.

* * * *

[I Tr. of Trial 149:52:]

* * * *

Q. Now, you have testified that you know that she considered herself to be in line for the job and you've pretty much agreed with me, I think, that her dissatisfaction over not getting the job is what caused her to leave the bank.

A. Well, I didn't agree to that. I agree she was unhappy. Why, I don't know. She didn't tell me.

Q. All right. And she was your immediate supervisor, at the time this job came up. Was she not?

A. I believe I had finally gotten inside. I was working under Brian then.

Q. All right. Well, she had been your supervisor?

A. She had been, yes.

Q. She would have evaluated you in August of '79.

A. And I went inside right after that.

Q. But you consider the bank's decision not to give the job to you to have been racially motivated, but you don't have any similar feelings because of Ms. Leavitt. Do you think she was denied that job because of her sex or her race? And she was white, so I guess that wouldn't apply.

A. Well, I couldn't begin to answer that because I don't have any fact that she was even denied or that she even applied.

Q. Do you know what Gail Leavitt's qualifications were? Do you have any firsthand knowledge of that?

A. I don't have any, no.

Q. Do you know what Sylvia Hardin's personal qualifications were?

A. No.

Q. What about Richard Burt's? Do you know what his qualifications were?

A. No, I didn't know what his qualifications were.

Q. Okay. You don't know, then, whether or not Mr. Burt had far superior qualifications for that job than anyone else that made application?

A. Well, he had previously—when he came to the bank, he had no experience. And soon after that, he was experienced as a bookkeeper. He was experienced as a teller. He got experience as bookkeeping supervisor right at that bank. So his—other than stating what was happening right there, well, then I can't, you know, express any ideas on his experience other than that.

Q. Very good.

You knew or did you know what Pat Cullar's qualifications were when she made application for the motor bank supervisor in 1980?

A. No.

Q. Okay. Who else, besides Pat Cullar and yourself, made application for that position?

A. Sylvia Hardin, again.

Q. All right. And I suppose your answer would be the same; you were not familiar with what Sylvia Hardin's qualifications were, were you?

A. No, I wasn't.

Q. Were you aware of anyone else, other than Ms. Hardin and yourself and Ms. Cullar, making application?

A. No, nothing definite. There was quite a few people saying they were going to, but I don't know if they did.

Q. All right. So in the—when the decision was made in 1980 to hire Pat Cullar as the motor bank supervisor, you were not then aware of who had the best qualifications. You knew what your qualifications were. You did not know what any of the other applicants' qualifications were; is that correct?

A. That is correct.

• • • •

[I Tr. of Trial 167-74:]

• • • •

Q. Now, in January of '81, you went on sick leave to have your foot surgery, and this was while you were serving as commercial teller.

Were you still working with Mr. Burt as his assistant or did you cease to have work at that time?

A. No, I was still working with him.

Q. And you went on—had your foot surgery in '81, January; and sometime about February of '81 is when these two positions came open again, lobby supervisor and the motor bank supervisor.

Now, you were home either getting ready to have surgery or recuperating from the surgery, were you not?

A. Yes.

Q. Okay. How did you become aware of the fact that there were—these two jobs were open?

A. That was in February of '81.

Sylvia called me.

Q. Are you sure it was Sylvia, or was it Mr. Burt that called you?

A. No, it was Sylvia that called me.

Q. Okay. Did Sylvia notify you of both positions or just one?

A. She notified me of the one position, and Richard Burt informed me of the other one.

Q. And when Mrs. Harden contacted you and notified you of the opening, did you—what action did you take?

A. I was excited, and I called up—you know, I called over to the bank to—

Q. Did you talk to Richard or to Gary?

A. I called and I talked to both of them, you know, about the position.

Q. The—And Richard was the one who was leaving the teller supervisor?

A. He was leaving his position, yes.

Q. Did you tell Richard that you were interested in that job and would like to be considered?

A. Yes.

Q. Okay. Do you know of your own knowledge, Mrs. Watson, who else made application for that lobby supervisor job?

A. Pat Cullar, Sylvia Harden, myself.

Q. All right. How do you know that?

A. Richard told me that they had applied.

Q. Okay. Now, Pat Cullar, at the time she applied, she was the motor bank supervisor, was she not?

A. Yes.

Q. And Sylvia Hardin was commercial teller at the time?

A. Teller, yes.

Q. And who else applied? Did you say anyone else?

A. I don't know.

Q. Okay. Do you know that there were no others, or are you just not aware of who they might be?

A. I am just not aware.

Q. Those two that you've named, Pat Cullar was the one who was ultimately selected; is that correct?

A. That is right.

Q. All right. Did you consider yourself to be better qualified for that lobby supervisor job than Pat Cullar was?

A. Well, there again, I had worked as Richard's assistant doing the very job that was open.

Q. Now, Ms. Cullar had been supervisor for about a year; had she not?

A. At the motor bank, yes.

Q. Those jobs are essentially the same, are they not?

A. Yeah, but a supervisor—a supervisor is not a supervisor.

Q. How is the lobby supervisor's job different from the motor bank supervisor's?

A. The lobby supervisor was over the motor bank supervisor, and generally over the tellers that was under that supervisor also, you know. They had to go through the chain of command.

Q. So that the lobby supervisor was a greater responsibility than the motor bank supervisor?

A. Yes.

Q. Did you consider yourself to be better qualified than Ms. Cullar to take that job?

A. Yes.

Q. Okay. Now, what about Sylvia Hardin, did you likewise consider yourself to be better qualified than Ms. Hardin to be—

A. I did.

Q. —the teller supervisor?

A. I did.

Q. I think you testified then, that Mr. Burt called you up and informed you that Pat Cullar had been selected as the lobby supervisor, and informed you of the fact that because she was leaving her current position that there would be an opening there.

A. Yes.

Q. Okay. Did you—we know from your testimony that you ultimately did make the decision that you wanted to be considered and you conveyed that to him; is that correct?

A. I told him I would think about it.

Q. And then you later called him back and said that—

A. The same day.

Q. And said you wanted to be considered?

A. Yes.

Q. All right. Do you know who was considered for that position? Who made application for it?

A. Evidently Kevin Brown.

Q. Obviously he must have, because he was selected. Do you know of anyone else who did?

A. Myself.

Q. What about Sylvia Hardin; did she make application?

A. She had applied also.

Q. Do you know of anyone other than those two, or the three of you, rather?

A. No.

Q. Did you consider yourself to be better qualified for that position than Mr. Brown?

A. I did.

Q. Okay. And, likewise, I assume that you considered yourself to be better qualified for that position than Mrs. Hardin?

A. I did.

Q. All right. Did—were you aware, Mrs. Watson, that Kevin Brown had served as assistant to Pat Cullar in the motor bank?

A. I was not aware.

Q. Okay. If you had been aware of it, would your opinion as to who was the most qualified have been different?

A. No, it would not have.

Q. Well, you testified just a minute ago, I think, that there is a difference between the motor bank supervisor and the lobby supervisor.

Mr. Brown was working there with Ms. Cullar, so he would have a little closer knowledge of how it was working at that time than you would; is that correct?

A. That would—I wouldn't agree with that at all.

Q. All right.

A. The reason being—I would like to state that the reason being, he did not have not even quite two years'

banking experience and I had all of those years of experience behind me.

Q. You had served as a teller for, what, about—let's see. By then about six years?

A. Approximately, somewhere around there.

Q. Approximately five or six years?

A. Somewhere in there.

Q. Whereas Mr. Brown only had something around two years' worth of experience?

A. A little over a year or somewhere to that effect.

Q. Okay. You realize, do you not, Mrs. Watson, that part of the responsibility of a supervisor is to manage or motivate or control people working underneath you; it is a management job rather than just a clerical job. You understand that; do you not?

A. Of course.

Q. Okay. So would you agree with me, Mrs. Watson, that someone could be an excellent technician and do a particular job better than anyone else could and still not be a very good manager of people, not be qualified to—he might be able to do the job better than anyone else but still not be suitable to supervise others doing that same job. Would you agree with that situation?

A. I agree to that.

Q. Have you, in fact, probably experienced that situation where someone was in a supervisory position that just was not adequate to manage people or not up to that task?

A. Yes.

Q. Okay. So my point is, that to be a supervisor of tellers would not require that someone have the absolute most experience as a teller, but merely that they have the skills that a teller needs to have and to be able to manage people as a supervisor should. Would you agree with that?

A. I agree.

Q. Okay. Were you of the opinion that Mr. Brown did or did not have the skills to be a supervisor?

A. I was of the opinion that he did not.

Q. Okay. Had you ever worked with Mr. Brown?

A. On Saturdays.

Q. Okay. How many Saturdays?

A. And I worked with him on afternoons when he came in at 2:00, you know, occasionally.

Q. Did you work with him every Saturday or was it—

A. No. I believe we worked—I was assigned, like, one Saturday a month or something to that effect. But I worked two Saturdays out of a month.

Q. Okay. So you might have worked with him as many as 24 days and as little as 12 days, then; is that correct?

A. Well, a couple times a month.

Q. Okay. Were you likewise of the opinion that Sylvia Hardin was not—did not have the qualities and the skills that it took to be a supervisor?

A. Yes.

Q. Okay. I take it you considered that you did have those skills.

A. I do.

• • • •

[I Tr. of Trial 184-85:]

• • • •

Q. You know or are you aware of the fact that Mrs. Weatherly made application for the two supervisor jobs that came open in 1981, the lobby and the motor bank supervisory jobs?

A. I wasn't aware.

Q. Okay. If you will take as a fact what I am telling you that she did make application, would you have an opinion as to whether or not you were more or less qualified for those two supervisory jobs than Mrs. Weatherly?

A. What year did she leave the bank?

Q. The records, I believe, will reflect that she left the bank about June of 1981, shortly before you did.

I believe that is what the records will reflect; yes, ma'am.

A. Uh.

Q. Let's assume that she was working at the bank in January or February of 1981 and continued at that point in time to continue to work there and she made application for both of those two supervisory jobs.

Would you be of the opinion that you were more qualified for those two positions than Mrs. Weatherly or less qualified?

A. Well, if she had made application during the time that I did, I was less qualified because she had been a supervisor.

Q. Okay. She had in fact been a supervisor for about, oh, a two-and-a-half-year period; is that correct?

A. I assume that you are correct. I am not sure.

Q. All right. And Mrs. Weatherly—was she white or black?

A. She was white.

Q. All right. Now, you are basing your statement that she would be more qualified than you on the fact that she had some two and a half years of supervisory experience?

A. Had she applied for that job.

Q. I am assuming in fact that she did apply.

Now, you know for a fact that she was not given any of those two jobs, were you not?

A. I don't—she wasn't given any of them.

* * * *

[I Tr. of Trial 194-95:]

* * * *

Q. All right. You also testified earlier to the fact that you were talking about the physical layout of the bank building and you referred to the basement, that being the first floor.

That is not really a basement, is it?

A. Which bank are we talking about, the old bank or the new one?

Q. Talking about the new bank, the bank located at Interstate 30 and Beech Street.

A. I think I stated that there was three levels.

Q. Okay.

A. First, second, and I might have called it the basement, but it is the first floor.

Q. There is no basement in that building as far as you are aware?

A. No, there was no basement in the new building.

Q. There are windows on that first floor and there are—

A. Yes.

Q. There is a main entrance to the building, in fact, located there.

A. Yes.

Q. Okay. And that's where the bookkeeping department is located, among other departments?

A. Yes.

Q. Are all the employees on that first-floor level, are they all black or are there white employees down there, too?

A. Mixed.

Q. Probably more white employees than black employees?

A. That is correct.

• • • •

[I Tr. of Trial 195-97:]

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Q. Since you have had an opportunity to reflect upon your earlier testimony, have you had any—any other situations of that sort that you have thought of and realized that you might have mistestified or testified selectly incorrectly? Any other situations that you have had come to mind?

A. Well, there's an instance where I misunderstood the question, and as far as qualifications when he asked me about these qualifications about these other people.

Q. Tell me about that.

A. I was thinking that you were talking about when you said "qualifications, had they had previous supervisory experience," you know, as referring to like Patsy, "Did you know; had she applied for the job," and I believe I stated that I was more qualified than they were. I can't really remember what particular people it was but Gayle Leavitt was one of them that was involved. She didn't have any previous supervisory experience when she first got that position that I knew about, but then, you know that she had got from the other job, well, then she would have been more qualified than I because of her previous experience.

Q. Gayle Leavitt was also white, was she not?

A. Yes.

Q. So if I understand what you are telling us now, you are changing your testimony to make it correct to say that if Gayle Leavitt had applied for the—I guess that was the lobby supervisor position in 1981, that you would agree that she was more qualified than you were?

A. Of course.

Q. Okay.

A. And Gayle Leavitt did not get that job, either, did she?

A. No.

• • • •

REDIRCT EXAMINATION BY MR. BRENDER

[I Tr. of Trial 203:]

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First in 1980, when the jobs first became open you had Richard Burt and then Pat Cullar.

Now, did either of those have prior supervisory experience at the bank in 1980 when those two jobs became open, the inside lobby position?

A. No.

Q. All right.

A. I'm sorry. I'm sorry; I made a mistake.

Richard Burt was bookkeeping supervisor.

Q. At that time.

A. At that time.

Q. All right. But with regard to—that was a position he was promoted to while he was there at the bank; is that correct?

A. Yes. He was promoted to bookkeeping supervisor.

* * * *

[I Tr. of Trial 205-06:]

* * * *

Q. And when you were with him and working with him and showing him the ins and outs of becoming and being a teller, you say his performance, that he had outages and he had various problems in learning the mechanics of the job?

A. Yes. He was very—he was out of balance every day. We had to stay and help him find his outage whenever we worked with him. He was out high amounts of money. In fact, he was relieved of his duties and put into the accounting room.

Q. Who did that?

A. Gary. Gary Shipp.

Q. All right. And how long had he been in a teller position when that occurred?

A. About almost a year, I believe, or a little less.

Q. All right. Now, what about Pat Cullar? To your knowledge, prior to her being named motor bank supervisor, did she have any prior supervisory skills or experience?

A. Supervisory, no.

* * * *

[I Tr. of Trial 207-08:]

* * * *

Q. All right. Let me ask you to look at Patricia Cullar's employment application, Exhibit 2, and look at

page 5 on that of her evaluation, which is dated July 31st, 1981.

Do you see the page I am referring to?

A. The employment history?

Q. Yeah. Look at the evaluation on page 5, the one for the period ending July 31st, 1981.

A. "What accomplishments in the last 12 months." That it?

Q. Right. But look where it says, "In what areas does this individual need improvement?" Do you see that?

A. Okay. Yes. That's No. 3. "In what areas does this individual need improvement?"

Q. Says, "Overall experience in supervising people," with an exclamation point; is that correct?

A. Yes.

Q. And that was some six months after she had been given the job that you had applied for also in 1980; is that correct?

A. That is correct.

Q. All right. And I'll ask you to look at Plaintiff's Exhibit No. 1. Once again, on page 5 of the performance report of Mr. Richard Burt—well, it doesn't have a date on it.

But it's the second one in the file. The first one just says '79. So this one is probably '80.

Do you see page 5 of that one, No. 3?

A. Okay.

Q. And it says, "Mr. Richard Burt apparently needs additional supervisor," or something of that sort. It is kind of written. Mine is hard to read. But apparently, "Needs what is called OJT,"—which I take it to mean on-the-job,—"training in doing some supervisory work;" is that correct?

A. Yes.

Q. Now, to your knowledge was the supervisory experience that was being credited at the bank basically just that. In other words, you were getting on-the-job

supervisory training with these supervisors; they were advancing?

A. That's what—can you repeat the question again?

Q. Well, the people that were making supervisors, from what you were aware of their qualifications, did they have prior supervisory experience—

A. No.

Q. —or were they getting it on the job?

A. They were getting on-the-job training.

* * * *

REDIRECT EXAMINATION BY MR. McGEE

[I Tr. of Trial 229-34:]

* * * *

Q. Okay. Given that prior experienec as the bookkeeping supervisor, is it still your opinion that you were better qualified than he was to do the—

A. Had he not had the supervisory experience, if he had come in just like I did with no supervisory experience, yes.

Q. But that was not the case; he did have that qualification.

And so as I understand your testimony, you are agreeing that he was better qualified than you were for that 1981 teller supervisor's job.

A. Since he had the supervisor experience.

Q. All right.

Do you know—no. Excuse me.

Given the knowledge of Mr. Burt's experience as a supervisor, and assuming that Gayle Leavitt and Patsy Weatherly also made application for that same position in '81 as—Excuse me. Mr. Burt was teller supervisor in '80, and Ms. Leavitt, assuming that they made application in '81 and also Ms. Weatherly in '81 for the lobby supervisor, would you agree that the bank's decision to select someone other than yourself for those posi-

tions could have been based on reasons other than your race?

MR. BRENDER: Excuse me. I am going to object. I think it is speculative what they could have done and didn't do it.

MR. McGEE: Your Honor, the witness has not had any problem in expressing opinions—

THE COURT: What I am trying—I don't think that is quite the right way to ask it.

MR. McGEE: All right.

THE COURT: I'll let you ask, "if that would change her previous opinion that she was discriminated by race and not—

MR. McGEE: Very Good.

BY MR. McGEE:

Q. My question, Ms. Watson, is you have indicated that you agree that Mr. Burt was better qualified for the lobby position in 1980 than you were; and you have agreed that, assuming that Mrs. Leavitt and Mrs. Weatherly made application in '81 for that lobby position that they were also better qualified for that lobby position than you are.

Now then, would you in light of that—those additional facts and assuming that they are true—I am asking you to assume that with me. I know that you have testified you don't know whether they made applications or not, but assuming that to be the case, would that affect your opinion that the bank's decision not to hire you for those two positions was based upon a racially motivated factor?

A. Well, I really don't know how to answer that. I would like to assume—to have my—

THE COURT: Well, you have got to just answer the question that was asked, with that assumption.

MR. BRENDER: I will object to the question because he's putting her—giving her a Hobson's choice. They didn't select either one of these two people. We

don't even know, or haven't heard until to day that they were even in the pool.

THE COURT: This is cross-examination, Counsel.

MR. BRENDER: I understand that, but he's asking her to select out of some people that he says were in the pool and ask her whether they are better qualified than her; and if they were in the pool, would that make a difference based on that fact though they didn't even select them, and I think that's a problem, Your Honor.

THE COURT: I overule the objection.

MR. BRENDER: Fine.

THE WITNESS: Repeat the question now.

BY MR. McGEE:

Q. I will try to make it shorter this time.

A. Okay.

Q. Assuming that, first of all, the decision in 1980 that you saw Richard Burt selected as the lobby supervisor and you were not selected, you have acknowledged that because of his previous experience as a supervisor in bookkeeping that he was better qualified than you are.

Now, would you want to reconsider or would you agree that there is a possibility that factors other than race may have had to do with the decision to choose Richard and not to choose you?

A. No, I wouldn't reconsider.

Q. Okay. Then is it still your opinion that the reason Richard was selected is because he was white, and the reason you were not selected is because you were black?

A. I still maintain that issue, yes.

Q. Now, with regard to the same position in 1981, the lobby supervisor's position, assuming that Gayle Leavitt made the application for that position and that Patsy Weatherly made application for that position, and of course, you made application for that position, you have testified that you agree that Patsy Weatherly was better qualified because of her prior experience as a supervisor and that Gayle Leavitt was better qualified

because of her prior experience as a supervisor. Do you still maintain that the bank's decision not to choose you for that position was because of your race?

MR. BRENDER: I object to this, Your Honor. The fact that these people were even in the pool, they were not selected. The person that was selected was white. She was black. And the Garrison Undergreen versus McDonough and all those decisions have to do with the actual selection, not who they might have had in the pool. And I think he's asking—

THE COURT: I overrule the objection.

MR. BRENDER: —her to speculate.

THE COURT: I overrule the objection.

BY MR. McGEE:

Q. Let me add to that, Mrs. Watson, also, the person who was selected, Pat Cullar, she also had experience also. There's three people who had experience when you had none.

A. Are we talking about—we are talking about 81?

Q. '81, yes, ma'am.

Now, I'm asking you if you would agree that the possibility exists that something other than race led to your not being selected?

A. Based on their—on the qualifications?

Q. Yes, ma'am.

A. No. I don't believe that.

Q. Even though these three people, or at least two of them you have acknowledged were better qualified than you, you believe that the person who was selected or the reason you were not selected is because you were black?

A. Well, I need to clear up possibly what I said when I say "better qualified." They had one qualification that I didn't have. I'll put it that way, instead of saying "better qualified." They had the one qualification that I didn't have, which was supervision, and I didn't have that. I didn't have on-the-job training like they did, and

that was the only thing that they didn't have—that they had that I didn't.

Q. And with those additional qualifications in mind, is it still your opinion that the selection or the reason that you were not selected is because that you were black?

A. Yes.

• • • •

REDIRECT EXAMINATION BY MR. BRENDER

[I Tr. of Trial 239:]

• • • •

Q. This on-the-job training that led to supervisory experience on the past—are all of these people we've talked about are all white that had the prior supervisory experience; isn't that correct?

A. Yes, yes.

Q. There had never been a black—

A. No.

Q. —that had prior supervisory experience at that bank, was there?

A. No.

Q. So if you went by that ratio alone, if you said, "All right." We're going to say, "You have to have prior supervisory experience to be a supervisor at this bank," and if they never let a black have it, then there was no way a black was going to be a supervisor at the bank, was there?

A. No.

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[TESTIMONY OF CLARA B. WATSON AT TRIAL, UPON QUESTIONING BY THE COURT:]

[I Tr. of Trial 243-46:]

• • • •

Q. Now, you said—you kept saying this morning that your increases were small.

Were your increases different, in different amounts, from what other tellers were getting?

A. Well, when I said my increases were small, I remember getting—I believe I got, like, a $15—I know I did at one time—a $15 raise, which was $7.50 on each pay period, which we got paid on the 1st and 15th. And looking at that, you know, in my opinion, it was small.

Q. Well, that's not the issue.

The issue is: Were the white tellers getting $25 for that same pay period increases where you were getting $15? That's what I am interest in.

A. Back during that time, I don't know. That was just a—

Q. Well, that's what I am trying to find out.

Were white people getting $25 day increases or $50 pay increases and black people getting $15 day increases?

A. Well, I understand what you are saying.

I can't verify that. That was a statement that I made; the increases were small.

Q. So you don't know whether your increases were smaller than the white people's or the same as white people or what?

A. No. During that time, no.

Q. All right. Now, you said another thing. You said black people's evaluations were always lower than white people's evaluations.

A. Yes. I said that.

Q. Now, how do you know this?

A. There again, among the blacks, we discussed it, and then there was some whites that I was friendly enough with that we discussed our evaluations, and our different comments on them.

Q. Did you get a copy of your evaluations?

A. Yes.

Q. In other words, were you each given a copy of your written evaluations that you could keep for your own personal records?

A. Yes.

Q. Would you sit down with other people and compare those evaluations?

A. At different times, we did, yeah. There was several of us, yes.

Q. I mean, both blacks would compare with whites and so forth?

A. There was some whites that I knew that we compared them.

Q. In the same line of work?

A. Yes.

Q. During the time—during the teller position or during whatever position you were talking about,—

A. Yes.

Q. —were there any certain areas of the evaluations that blacks were always rated lower than the whites?

A. I could look at the evaluation chart and possibly tell you.

Q. All right.

A. There's one that where it says "quality of work." Now, there were some blacks that were rated very low on this. I happend to be one of those that was rated an 8 on the quality of work.

Q. Were you rated higher than some of the whites that you looked at?

A. Well, there was some that was rated at 9—

Q. Well—

A. —that was white.

Q. That is not what I was asking you.

A. I rated higher in some instances against the whites, lower in others.

Q. All right. In other words, that is what I am trying to find out.

In some areas, did you rate higher than whites did in that particular area?

A. Yes.

Q. And in some areas, whites rated higher than you did in particular areas?

A. Yes. And then when you take the overall total, they had a higher score than we did.

Q. Was that in every case?

A. Well, in the cases that I looked at, you know, just the people that I—you know, that we discussed.

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CROSS EXAMINATION OF GARY WAYNE SHIPP
BY MR. BRENDER

[I Tr. of Trial 249:]

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Q. Do you want to state your name for the Court, please?

A. Yes, it is Gary Wayne Shipp.

Q. And whereabouts do you live, Mr. Shipp?

A. I live in Bedford, Texas.

Q. And how are you employed, sir?

A. I am a senior vice-president cashier of Fort Worth Bank & Trust.

Q. All right. And how long have you held that position with that employer?

A. Since 1977.

A. All right. And when did you first go to the Fort Worth Bank & Trust? When were you first employed there?

A. April 1st, 1975.

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[I Tr. of Trial 256-58:]

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Q. All right. Now, are there any black officers at the bank?

A. No, there's not.

Q. Have there ever been during the time that you have been there?

A. No.

Q. All right. And then, are there any black directors at the bank?

A. No, there's not.

Q. Have there ever been since you have ben there?

A. No.

Q. And then, are there any blacks that are in supervisory positions at the bank?

A. Yes, there is.

Q. And who are they?

A. Sylvia Harden.

Q. Is she the only one?

A. Yes.

Q. And what is her job?

A. She's currently the assistant motor bank supervisor.

Q. Is she the first black since you have been connected with the bank that's ever been in a supervisory job?

A. Yes.

Q. And the only one; is that correct?

A. Yes.

Q. When was she promoted to assistant motor bank supervisor?

A. Almost a year ago.

Q. And did this job—this assistant motor bank supervisor, in the past, you didn't have an assistant motor bank supervisor, did you?

A. No, we didn't.

Q. When was that job developed or created or—

A. Approximately one year ago. We had an unofficial designation, you know. Someone who the supervisor felt was capable of handling the afternoon duties after the main supervisor left, who was looked at to assist and to help get the things done, get the bank closed up and run it during those hours that they weren't there. We felt it was time with the growth of the bank to designate an official title.

Q. When you made Sylvia Harden—I take it she was a teller before that, I believe is the testimony.

A. Yes.

Q. And you made her an assistant motor bank supervisor.

Did that involve a raise? Did she receive a raise?

A. Not immediately, as I recall. I think after a 90-day period of time she did. Somewhere within 90 days.

Q. Was this 90 days, was this some kind of a break-in period or something?

A. We use that. That's been a standard basically all the time that I have been with the bank, and even prior to that.

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[I Tr. of Trial 260-61:]

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Q. All right. Now, does Sylvia Harden have as her responsibilities to rate or to evaluate employees?

A. She participates in those evaluations with the supervisors.

Q. But she doesn't actually go in and do the rating and sign the form herself?

A. No, she does not.

Q. All right. Now, so far as the evaluations go, the only people who are actually making the evaluations in the final analysis are still white employees of the bank?

A. Excuse me? I didn't—

Q. The only people who are making evaluations of other people at the bank are white employees; is that right?

A. No, she participates in them. She's just not the full supervisor.

Q. Well, the full supervisor is the one that signs the form and takes responsibility for it; isn't that correct?

A. That is true.

Q. All right. And so even at this point, only the whites are the ones who actually make the evaluation of the other employees; isn't that correct?

A. No, she participates in it. But as far as officially signing forms, she does not do that.

Q. All right.

A. There may be an occasion when the supervisor has been off on vacation and she did that. I can't recall if that is true or not, but that could happen.

Q. Well, in looking through the data that we have received, we don't find any form that has Sylvia Harden's name on it.

A. All right. Then it hasn't happened.

Q. All right. And in fact, during those years that this class is covering, from October 21st of '79 through the present, the information that we have been given would not indicate that any black employees have ever evaluated any white employees. Is that your understanding?

A. Not actually signed the review form, no.

Q. And asside from Sylvia Harden, none of them have had any participation in that process; is that correct?

A. That's true, yes.

• • • •

[II Tr. of Trial 7-8:]

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Q. Now, with regard to salary procedures, just a couple of points. First of all, in each of these ranges from 1 to 9, you have a midpoint salary and then a maximum; is that correct?

A. And also a training minimum.

Q. Okay. The training minimum is the one that you place a person in if they just put them in that grade, I take it, just off the street or something?

A. Normally if the person has no experience in that job, yes.

Q. Okay. In other words, for the most part that would be a situation that you might have where somebody came in, was a new hire, and they had no teller

experience, for instance; you might have a training grade for whatever, 90 days or whatever?

A. Previous banking experience. If they didn't have any previous banking experience, chances are they would come in somewhere between the training minimum and the minimum.

Q. All right. So ordinarily somebody in one of these grades would be somewhere between the minimum and the maximum during this period of time except in training; is that correct?

A. That sounds true, yes, that sounds true.

Q. All right. Now, and you—in the position that you are in, you have the ultimate say-so in what the salary would be for anybody who is a new employee, anybody who is a new employee and just coming in the bank; is that correct?

A. I have the ultimate responsibility for the personnel area.

Q. Okay.

A. I don't set those salaries.

Q. Well, page 2, for instance, in the paragraph B where it says new employees, the second paragraph under that section, says, "To insure equity in the integrity of the salary administration program no salary offer shall be made to a prospective employee without agreement between the supervisor of the position and the officer in charge of personnel."

A. That is true.

• • • •

[II Tr. of Trial 10-11:]

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Q. Okay. Now, if we look on this exhibit 33 where we have salary increases, page 3 at the top, it says, "No salary increase will be made effective without the approval of the salary committee and the officer in charge of personnel."

Once again, the same responsibility. And up until September of '83, I take it that was your responsibility

entirely, and now it is the responsibility of the person who works directly under you; is that cvorrect?

A. Not entirely. The salary committee, which is made up of three people in the bank—

Q. All right.

A. —which includes the officer in charge of personnel.

Q. Okay. Well, it says, "without the approval of the salary committee and the officer in charge of personnel." So you had authority separate and apart from the committee, did you not?

A. No, I did not.

Q. Who were the people on the committee that would set there salaries or have some authority to?

A. Since the inception, it's generally been the president of the bank or the executive vice-president of the bank—

Q. All right.

A. —and the officer in charge of personnel and the senior operations officer.

Q. Okay. And who are those people at the present time? We know who the president is, but who are the other persons?

A. At the same time, I am senior operations officer. Helen Brister is officer over personnel.

Q. All right.

A. And Jim McKnight, James McKnight is the executive vice-president.

Q. And how long has he been on that committee?

A. Approximately two years, two-and-a-half years.

Q. Okay. And you have been on the committee through the entire—or you have been either the officer in charge or on the salary committee througout the entire course of this class, have you not?

A. That's true.

• • • •

[II Tr. of Trial 14-19:]

Q. You were the person who ultimately had to sign and approve, as the personnel officer, the percentage

increase in pay that was given to each of these employees who was reviewed on the nonsalary—the nonofficer salary review worksheet, were you not?

A. That's true.

Q. And you had the—you had the option of changing the evaluation score and changing it up or down as you saw fit, did you not?

A. No, sir, I did not.

Q. Did you on occasion exercise that authority that you had to change the percentage increase that a person would receive?

MR. McGEE: Your Honor, I believe the witness said he didn't have that authority.

BY MR. BRENDER:

Q. You testified you did not?

THE COURT: Yes; he said he did not have that authority.

BY MR. BRENDER:

Q. Well, you've previously testified that you did, had you not?

A. When did I testify?

Q. You testified twice that you were the one that ultimately had responsibility for this and if you thought that employee was not performing as rated by the supervisor, then—

A. Let me say this.

Q. All right.

A. If, as a member of the committee, if the supervisor comes to the committee with a review form that is completed and some of the ratings I have personnal knowledge of that appear to be overrated or underrated, whatever, then we discuss those. But I cannot recall me being the one that has actually said, "Change the review form."

Q. Well, by discussing them, you mean you could tell the supervisor you think that person is overrated or that person is underrated and they should make some change in the evaluation.

A. Based on the examples that they give and the opinions that they give about that employee, if they don't meet the rating criteria, then we discuss either that they've misrated them or the examples that they have given do not fit the rating.

Q. All right. What you are saying, then, is that you just don't take it upon yourself to change these?

A. No.

Q. But you certainly do have—you are the one that finally signs this and finally approves it and their rating has to finally meet with your approval; is that correct?

A. If it meets with the committee's approval and if I am the officer over personnel or had been, then I am required to sign the form.

Q. All right. Well, are each one of these taken to the committee, or what is the flow?

A. This is the last product that we looked at. The first thing we do is go through the complete review of each employee, the review form.

Q. Uh-huh.

A. Stem by step. Example by example. And if we have knowledge that maybe the ratings don't look adequate, that they don't look either—they don't look like the examples that we have rated them the way they should be rated, then we discuss those points.

That's not a standard thing that we discuss, changes, but it does happen.

Q. Well, you are not telling the Court that every one of these 80 employees who has a review is actually—that you're actually looking—that your committee is actually looking at every one of these forms. They go to your office first, do they not?

A. No, sir, they do not. They come in front of the committee. I don't look at them at any time prior to that committee meeting.

Q. All right. And then, of course, you have been a member of this committee throughout the time we are talking about.

A. That is correct.

Q. All right. And you saw one example earlier when you were here of an evaluation on Clara Watson that was changed and reduced, did you not?

A. That is correct.

Q. Okay. And one of the persons—and you are the only main—you are the only person whose signature ever appeared on any of these sheets; is that correct?

A. That's true.

Q. All right. And in fact, on the one we're looking at right here, this Linda Brimer, this one was actually increased over what the supervisor had—had initially evaluated here at, was it not?

A. It's increased over the point rating, yes.

Q. All right. And down at the bottom it says, "Additional award for extra work and excellent quality of job done." Is that correct?

A. That's what it says, yes.

Q. And that is your handwriting, is it not?

A. Yes.

Q. Okay. It is not in the committee's handwriting or anybody else, the president's handwriting or anyone else.

THE COURT: Let me get this clear, now:

Do you make any of this—I mean, is this done in a committee or is it done by you individually?

THE WITNESS: This is done in a committee, Your Honor.

THE COURT: Do you make any sign to—or did you sign any paper that—because you approve it or disapprove it or because the committee approves it or disapproves it?

THE WITNESS: It is because the comimttee approves it.

THE COURT: What kind of vote is required in order to increase, decrease or what?

THE WITNESS: It's just a general overall opinion of whether the facts are right or wrong.

THE COURT: Well, I mean, do you—do all members of the committee agree before any lowering or raising—

THE WITNESS: Yes, sir.

THE COURT: —has been accomplished?

THE WITNESS: Generally it is that, and occasionally there will be a majority that says, "Yes, I know about it" and one will say, "I am not aware of that," if we change something. But we talk about it at great length and generally everyone agrees.

THE COURT: And do I understand that each and every employee is reviewed by this three-member committee?

THE WITNESS: Yes, sir.

THE COURT: Okay. I just want to be clear on that. I mean, there's been kind of going—I just want—All right.

BY MR. BRENDER:

Q. All right. Of course, you being the personnel officer, I take it that your word before that committee is given a little bit more weight than some of the other people who are not in charge of personnel. That is what your job is, isn't it

A. Not unless I have knowledge of their performance.

Q. Well, your job as personnel officer is to know if somebody not performing well, or the complaints about a person's performance are going to come to you as the personnel officer not, not to the president of the bank, are they?

A. Well, occasionally it happens that way but not often. They usually come to me.

Q. All right. That is the chain of command, is it not?

A. That is right.

Q. In other words, ordinarily the complaints would come to you and you are the one who would then take

that to the committee if somebody would say, "This person is not performing very well," but the supervisor is rating them very high or something of that sort.

A. That happens occasionally.

Q. And I take it it is rare, if ever, that the committee goes against your recommendation if you say, "This person is performing outstanding work, doing outstanding work and they deserve a little bit more than the supervisor has given them," I take it, they are inclined to agree with you, are they not?

A. I don't normally make that recommendation. The supervisor makes that recommendation.

Q. Well, I am talking about if you are going to change one of these from what the supervisor has done.

A. If during the discussion we see a rating that is not rated properly, then we discuss it.

• • • •

[II Tr. of Trial 20-21:]

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Q. And if you have one of these that comes through and Linda Brimer is rated a 70, and you are going to be the one more than likely who is going to know that maybe she ought to be an 88 instead of an 70, because you are the officer in charge of personnel.

A. Well, that is not true. The supervisor should know that a lot better than I should.

Q. Well, I am talking about when it gets past the supervisor to you, the supervisor has given you this sheet with the 70 on it, and the question is: Are you going to approve that 70, which is your prerogative, or are you going to change it?

A. If the rating appears to be proper, I have no questions about it.

Q. By that I mean, the question is: Who is going to determine? Who is the one most likely to know whether it is proper or not? And that is going to be you, isn't it?

A. The supervisor. The supervisor is with those people on a day-to-day basis. I don't do that.

Q. All right. But you are the one who has to consult with the supervisor, according to the salary plan, every time there's a salary raise or increase; right?

A. Because I'm part of the committee, I do that.

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[testimony of Gary Wayne Shipp at trial, upon questioning by the Court:]

[II Tr. of Trial 23-26:]

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THE COURT: Tell me how a review session operates.

THE WITNESS: Okay.

THE COURT: Just start at the beginning and tell me how it operates.

THE WITNESS: Okay. At a given time we go ahead and set salary reviews, and prior to that the supervisors receive their review forms, like two weeks prior to the committee meeting being set.

They complete those reviews. They come individually to the meeting and present those reviews to the salary review committee, which is the executive vice-president, officer in charge of personnel and the senior operations officer.

THE COURT: Now, has the members of the committee seen that review sheet prior to the supervisor appearing at the meeting?

THE WITNESS: No, sir, not as a group.

Now, it could be that—let's say the senior operations officer, let's say there's a problem with an employee's review. That supervisor, because of the answer, that person might go and say, "I'm having a problem on this area right here." So that person may have seen the review but not in total sense generally. And nothing is made—no decision is made at that point. It comes in front of the committee to be presented by the supervisor.

The COURT: In other words, you have got your three-member committee—

THE WITNESS: Yes, sir.

THE COURT: —and the supervisor present; and the supervisor, does she go through them name by name?

THE WITNESS: Yes, one at time.

THE COURT: Sheet by sheet.

THE WITNESS: Yes, sir.

THE COURT: And you discuss them one at a time.

THE WITNESS: Yes, sir.

THE COURT: How many times a year is this done?

THE WITNESS: It is done every month.

THE COURT: It is done every month.

THE WITNESS: Yes, sir.

THE COURT: Does it affect all employees every month, or does it just affect those employees that the supervisor is making some recommendation concerning salary about?

THE WITNESS: Your Honor, there is a—when we set this up in 1979, there became a standard review date for everyone at that time. It was either their anniversary date or the date of their last increase, and it's gone forward since then. In other words, every employee of the bank knows when they are going to get their performance review, and the supervisors know. And we send out the forms on the employees that are receiving their review that month, and those are the ones that are reviewed.

THE COURT: In other words, it's their anniversary date.

THE WITNESS: Yes.

THE COURT: So it is just those that have an anniversary date each month that you are reviewing?

THE WITNESS: Right, or it could be 12 months from the date of their last increase, which there are times when it varies from their anniversary date.

THE COURT: All right. I'm clear.

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CROSS EXAMINATION BY MR. BRENDER

[II Tr. of Trial 31-32:]

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Q. Okay. And when you—when Richard Burt became the lobby supervisor in 1980, what grade was he?

A. In 1980, that was a nonexempt position. It was an officer's job, and they did not have grade ratings.

Q. Was it an officer's job by the person that held it before him, or was he made an officer?

A. It was an officer's job for a number of years prior to him taking the job.

Q. And then when you named Pat Cullar to that position in 1981, about January or February, both of these dates. I get them confused sometimes, but in any event, we are talking about the same time, almost a year later. How was the job rated then, or graded. Once again, the inside lobby teller job?

A. The inside lobby teller supervisor job?

At the time that that job was going to become vacant, as I recall, we looked very much at the position. Because over the years the job had changed. And not, you know,—the job was going to be not responsible for other things such as purchasing which it had been in the past, and some other duties that the—the job had just grown to a point that they didn't—they needed to be doing supervisory, teller supervisory work only. And as it rated out, it did not—it was not an officer position.

Q. It downgraded to a rated—or a graded job; is that correct?

A. Basically that is right, yes.

Q. And what grade job was it? What number grade was it?

A. It was an 8 or a 9. I don't recall.

Q. All right.

A. I think it was a 9.

Q. All right. So when she took the job, she was not an officer?

A. That is right.

Q. In 1981; is that correct?

A. That is right.

Q. And the position became a regular graded job?

A. That is right.

Q. Even though it had supervisory responsibilities, apparently; is that correct?

A. That is true.

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[II Tr. of Trial 49-50:]

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Q. All right. And does your—what percent of these people, how many of these people are you actually interviewing? Are you interviewing some?

A. Actually interviewing, I have only interviewed the people that go to work directly for me. We're talking about a couple people in the last two to three years.

Q. So you are not interviewing these people directly?

A. That is right.

Q. But you are one that makes the final decision on whether they are hired or not, are you not?

A. No, the supervisor does that.

Q. Well, you have testified previously that you were the one, though, that consulted the supervisor. The supervisor made the recommendation, but you were the one that made the final decision; did you not?

A. Ultimately I am responsible for the personnel or have been for the personnel department, personnel area.

Q. And who they hire; right?

A. I did testify to that but I want to add to that, it wasn't complete.

Q. Pardon me?

A. That testimony was not complete.

Q. So you are changing your testimony in that regard, too.

A. I am adding to it because it wasn't complete. I do not select the people for the supervisors. They do their own selections.

The only time—what I meant about consulting with those people, is that the person in the personnel area of our bank basically has the responsibility for seeing that the people are qualified from a basis of the reference that they give. We have to check those and we do credit checking. And basically, that is what the personnel area does.

Now, also, we have those salaries ranges that the people are hired in, and generally the applicant specifies what kind of dollars that they're looking to come to work for. And the supervisor finally decides which person they're going to hire, and they know what salary ranks that they can—that they are dealing with. But when it comes to the, actually discussing—we look at the salary to make sure it fits the guidelines. But I do not make those choices for them, and I know my testimony sounded like that, but I just don't do that.

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[II Tr. of Trial 53:]

Q. All right. But as is, I suspect, usually the case with anybody who has ever hired an employee before, frequently they are not always that clear cut; there are several things, several people in competition and they have got good points and bad points and the question is whether you want this person or that person. You help them make that decision, do you not?

A. No, I do not.

Q. You tell them, "Make a decision and bring it to me?"

A. That is correct.

Q. Isn't that what you are saying now, anyway?

A. That is the truth.

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DIRECT EXAMINATION BY MR. McGEE

[II Tr. of Trial 76-77:]

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Q. All right. Mr. Shipp, earlier you were discussing to the Court the method in which thhe salary review committee evaluates—or reviews the evaluations of employees.

A. Right.

Q. I think you started, and I don't know—I'm not sure if you went all the way through, but let me bring you up to where I think we stopped.

As I understood your testimony, the supervisor receives the evaluation forms some two weeks approximately prior to the evaluation—or to the review committee meeting; is that correct?

A. That's correct.

Q. And that supervisor then prepares an evaluation of that employee, and does she come to your office and sit down at a computer and get you to help her fill out the evaluation, or does she substantially or entirely do that by herself?

A. It's the supervisor's job to complete them, based on their review of that employee—

Q. All right.

A. —mine or anyone else's.

I did mention that occasionally if there's a problem with an area and they need some help, you know—they're not just—maybe they're not sure just how to—how that rating should be scored, occasionally that would happen.

Q. Okay. Now, was that a routine matter or a very infrequent situation?

A. That's very infrequent, and they usually go through their immediate supervisor—

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[II Tr. of Trial 81-83:]

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Q. Now back to this evaluation committee, we've reached the point where the supervisor has received her evaluation form. And these are standardized forms that all the supervisors—the same form for all employees, all nonexempt employees. And he or she then either takes it home or sits down at their desk, and anyway, fills out the form on a particular employee.

What happens next with that evaluation form?

A. The next thing that happens on the day of the review committee, depending on what supervisor comes first, they come in front of the committee, and we actually go fact by fact, criteria by criteria, looking at each point that they've rated them and the reasons that they justify for rating them that way.

Q. Are copies made of the evaluation and handed to each of the members of the committee?

A. No, it is not.

Q. All right.

A. It is available to go look at, but we have a blank copy we work from.

Q. For instance, Mrs. Crow is a supervisor in the new accounts section, I believe.

Would she stand up before the committee or sit with the committee and say, "All right, my employee is Mrs. Smith."

"On the first item, which is quality of work," let's say, "I have evaluated her as an 8."

Is that the way it is customarily done?

A. That is right.

Q. All right.

A. Then she proceeds to tell us why she rated her that way.

Q. All right. And that basically follows the examples they have written down beneath that?

A. Correct.

Q. All right. Let's suppose in the process of reviewing Mrs. Smith's evaluation that some member of the committee either doesn't—would disagree with Mrs. Crow's evaluation of Mrs. Smith or just doesn't understand how she came to an 8 in—and maybe the examples don't seem to support it.

Is that when the committee then would make some input into the review process?

A. It's an informal committee. I mean, we ask if an occasion—

Q. You don't have to raise your hand and get recognition from anybody or anything?

A. No, not at all. We are free to speak.

And whoever that person may be, says, "Hey, I have a problem with that because the examples don't fit," or, "I know of an instance," but that is very rare. But, "I know of an instance, you know, where this person has done thus and so." And I wonder, does that alter, you know, your judgment. The supervisor generally knows best about what their employee's performance is.

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(II Tr. of Trials 83-85:

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Q. Well, let's go specifically to the situation with Mrs. Watson's evaluation that you have there in front of you. I believe her '79 evaluation where a figure was changed, I think on item 11, is reduced from 10 to 8, I believe; is that right?

A. Let's see. Under 11, yes.

Q. All right. What is item 11? What is that entitled?

A. That is—the criteria in friendliness and courtesy. In other words, the way that the employee—what kind of attitude and attention and the personality do they have towards all other employees, towards the bank

customers, the supervisor that supervises them and any other persons that they may supervise.

Q. All right.

A. Their general overall attitude.

Q. All right. Mrs. Watson's supervisor at that time was Gayle Leavitt; is that correct?

A. That's correct.

Q. Now, do you remember—first of all, were you present at that committee meeting that reviewed that particular evaluation of Mrs. Watson?

A. I am sure I was.

Q. All right. Do you know or do you recall the circumstances that led to that figure being reduced from 10 to 8?

A. Yes.

Q. All right. Tell the Court what those circumstances were.

A. Well, in any of these ratings, the top rating means there's just little room for any improvement whatsoever. You know, the person is basically beyond getting any better. And Clara had a little bit of a problem with some of the employees, Lenna Gray specifically. And you know, if there's a problem getting along with any of her other employees or the supervisor, then, you know, there's no way—apparently the committee decided that is not perfect.

Q. Okay. Did the committee instruct Mrs. Leavitt to reduce that from 10 to 8 at that point?

A. I do not remember how that goes. We do not instruct them to change them. If the supervisor disagrees —again, they know their people better than we do. If they disagree, they have more to say in that meeting, really, than we do.

Q. The reduction of that point score from 10 to 8 reduced her overall point accumulation by two points, and you caused her to go to a lower percentage increase; is that correct?

A. That's correct.

Q. How much of an increase reduction was that or how much less increase did she receive?

A. Actually, the increase amount was about a 7.3 percent, and had that—if the 10 had been correct, and she had been rated the 72 points, it would have been an 8 percent, which amounted to $3.80 per month difference.

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[II Tr. of Trial 85-88:

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Q. All right. Back to our hypothetical situation with the review committee.

The supervisor has presented that, and in a routine situation, the committee listens to her presentation or his presentation.

And you then—what do you do next?

A. Okay. Basically, the—normally, the committee generally agrees with the supervior. Like I say, they know and they are able to rate these people better than we are. Basically, that is the end of it. The points are added up. The supervisor has already done that. We just verify that they are added up correctly, figure their increase, and that's basically how it goes.

Q. Is the review—the worksheet, the sheet where the points are totaled and the actual increase is calculated, is that done in advance or is that done while the committee is meeting?

A. It's either way. The supervisor in a lot of cases will go ahead and figure it—

Q. Okay.

A. —and come before the committee.

That particular form does not go back to the employee. The review form goes back with all the documentation on how the person is rated.

Q. And there's been some comment about the fact that many of these evaluations were signed by you as personnel officer.

A. Yes.

Q. All right. Does the personnel officer—does the personnel officer sign that review if he chooses to ignore the recommendations or the comments of the salary review committee, or is that only with their conference?

A. It's only with the conference of the committee.

Q. Okay. Does the personnel officer have any greater authority with regard to increases than the committee or any other member of the committee?

A. All salaries are set by the committee.

Q. Okay. The—

There are some circumstances where there are changes or additions made to the person's—well, the increase they would be entitled to, just based upon their evaluation points.

Typically, can you characterize for the Court why a person would receive a greater salary increase than the evaluation would otherwise justify them to?

A. Well, there are several things. You know the policy that we work under is the salary administration. The policy that we work under is by and large the rule, but generally if an employee has during this period of time, has changed duties significantly, normally—or things that appear to be significant or they have gone from, let's say, a teller grade 5 to a, let's say, a new accounts clerk grade 6, then there's consideration given within the policy for an adjustment over and above their performance review rating.

So there's one instance that that can happen.

Q. Okay.

A. Also, if—you know, there have been times that come review time, we have noticed that an employee because of current salary ranges within their job grade or because of upcoming, like in December, those grades are changed, usually every year, that the person has fallen below the minimum in the range.

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[II Tr. of Trial 88-89]

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A. In addition to that, there are—occasionally the supervisor will come in with the review form, will go through it and they will recommend, because of for some reason that the person receive additional pay. Maybe they've—I don't know specifically what reason.

You know, they have been going over and above their normal job duties to do certain things or maybe they've changed but not dramatically. You know, not a total new job or anything like that.

And the supervisor recommends that we do X, you know, give them an increase maybe above that stop. That's not—that doesn't happen very often but it does have and they have that flexability.

Q. Would the committee itself make thhe same type of recommendations for increase?

A. No.

Q. Okay. Why is that?

A. Well, it's just not our job to do that.

Q. Okay.

A. It is the supervisor's job. If they feel like the employees should have something different than the review.

Q. As you are aware, Mr. Shipp, from sitting here in the courtroom these last two days, the allegations are that you are the one that does all the hiring, sets all the policies of the bank and ultimately sets all the salaries and increases that all of the employees receive.

Is that a fact?

A. That's not true.

* * * *

[II Tr. of Trial 92:]

* * * *

Q. Now, let's assume that there is an opening and it so happens it is in the teller department and I say, "Well, I don't have any experience but I would like to work in a bank, and I think I would make a good teller.

You know, I have had some opportunities where I have at least dealt with money before, so I think I am somewhat qualified or can learn."

Would I be granted an interview at that point?

A. Well, if the supervisor and the—if the supervisor has determined that they need someone with experience, probably not.

Q. Okay.

A. If it is a situation where the supervisor feels like that they can take someone and put them in a position to learn, then possibly. But generally that's—if it's a situation where they can take time to train these people, someone within the bank has already applied for and gotten that job: You see what I am saying?

[II Tr. of Trial 95-98:]

* * * *

Q. Mr. Brender was questioning you about the effect of tenure of an employee on that employee's salary.

Is that, in your experience at the bank, is that the single most important factor that affects an employee's salary?

A. Not at all. The main thing that is going to affect their salary is; number one, the initial salary at which they come to work for the bank at. And subsequently from there, their performance reviews that their supervisors do to determine what kind of increases they get. Tenure really, really does not enter into it.

Q. You have some employees in the bank who have been tellers at the bank for a number of years, do you not?

A. That is correct.

Q. I think one probably has in excess of 20 years experience?

A. Yes.

Q. Or tenure, I should say, not experience but tenure.

A. Actual tenure, yes, Adda Addington; and Mildred Day has 25 years of experience. Not that much tenure.

Q. Is it possible that even considering all that tenure that these employees have that someone who comes to the bank as an applicant for a job as a teller who has, say, two or three years experience at Interfirst Bank or somewhere else here in town and has demonstrated that they have some knowledge and experience as a teller, they would come in at approximately the same salary that Mildred Day or Adda Addington have achieved?

A. That is possible, yes.

Q. Is that not unusual?

A. We don't—as a general rule, the personnel department, you know, shouldn't allow, if they can control that—a person—unless they have the exact same amount of experience, they might come in at near or the same as.

Q. Okay.

A. That's possible.

Q. Do you—does the—or the applicant indicate what salary he or she is willing to accept in some cases?

A. Generally they do.

Q. All right. And does that have any effect on what their initial salary is?

A. Absolutely, yes. Certainly does.

Q. I assume that if the bank has the opportunity, it would try to hire all employees at the lower end of the range just for pure economic reasons?

A. Well, we're all in business for one reason: That is to make a profit. If—unless it's completely out of the range, yes. If they say, "I'll come to work for 800," and that is the low end of the range and they agree to do that, then, yes, we're going to do that, probably every chance we get.

Q. And I suppose also if I came into you and I said, "I would like a job and here is my experience," and you say, "Well, we want to hire you. How much money do you want?" And I say, "Well, I'm open. I need a job."

Do you say, "All right. We're going to pay you the top of the range," or do you try to—do you have a—

A. I'm sure that is not the case. We would not pay them top of the range. You know there's a range there.

And based on whether they have any experience in that job is generally how we start looking at them.

Q. All right. Does the person's initial grade affect what their salary is at a given time?

A. Yes. It will affect their starting salary, and could affect their maximum salary. Because there's a range there from minimum to maximum.

Q. If I come to work at the bank as a grade 8 employee and I've had two or three years experience at another bank doing the same job and you hired me in, is it likely that I may be making a greater salary than someone who is a grade 5 and has had 10 years tenure with the bank?

A. It's very possible.

* * * *

DIRECT EXAMINATION OF
THOMAS R. MARSHALL BY MR. BRENDER

[II Tr. of Trial 103-04:]

* * * *

Q. Would you state your full name for the Court, please?

A. Yes. I'm Tom Marshall.

Q. And whereabouts do you live, Tom?

A. I live in Dallas, Texas.

Q. And how are you employed?

A. I'm employed at the University of Texas at Arlington.

Q. And in what capacity?

A. I'm a Professor of Political Science.

Q. And how long have you been so employed?

A. Seven years.

* * * *

[II Tr. of Trial 104:]

* * * *

And prior to assuming your position at the University of Texas at Arlington, where were you employed or how were you employed?

A. I was a graduate student at the University of Minnesota.

Q. And in what field?

A. Political science and research methodology.

Q. All right. And in that connection, you received your undergraduate training where?

A. At Miami University in Oxford, Ohio and my Ph.D. at the University of Minnesota.

Q. And what was the field or the field of study or in what area did you receive your Ph.D?

A. Political behavior and research methodology.

* * * *

[II Tr. of Trial 105-07:]

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Q. Tell the Court briefly and not to repeat what is in the resume, but what experience and what work have you done in the area of statistical analysis?

A. Okay. I have taught some statistical courses at the university, and I have also done some survey sampling and some consulting for several groups; among them were some law cases, which date back several years. I think they are listed on that resume.

Q. All right. And in that connection, do you, in the course of gathering evidence as a government professor, do you have occasion to use statistics and statistical analysis in—I say government, political science—in making analyses for the various work that do you in that capacity?

A. Yes, sir, quite a lot of time.

Q. What type of courses have you taught, statistical courses at the University of Texas at Arlington?

A. They have a research course. They have a computer methodology course, both at the graduate and un-

dergraduate level. And then in the behavior courses, students normally do some statistical work with voting behavior studies or other kinds of studies.

Q. All right. In addition to statistical analysis, you have also done sampling and sampling techniques and things of that sort for

A. Voter.

Q. —voter studies and that sort of thing; is that correct?

A. Yes, sir, for voter studies and surveys.

Q. Okay. And in that connection, do you perform the usual and customary tests of statistics and statistical matters with regard both to the social sciences and to the analysis of data within the social sciences?

A. Yes, sir.

* * * *

[II Tr. of Trial 114-19:]

* * * *

Q. Okay. Now, Tom, with regard to going back, now, and looking at both Plaintiff's Exhibits 9 and 10, it appears to me that the number of—of blacks who are—Basically what this shows, as I understand it, are what are called rates of hire—is that correct?—or rates of offer in the case of the offer.

A. Yes, sir.

Q. All right. And what we're examining is, we're looking at the total number of applicants that are coming through and we're dividing them up by race. So we are looking at the percentages of black and the percentages of white, and then we're saying: All right, what percentage of those that are black that are applying are actually getting hired and what percentage of those that are white that are actually applying are getting hired; is that correct?

A. Yes, sir.

Q. And by looking at applicant flow data such as this, you are able to get a better picture of what is actually happening in the bank than if you were simply to ex-

amine the total population. Say the total population shows 20 percent of the population of the city of Fort Worth is black and therefore, they must have had 20 percent applicants, or the county is 15 percent, and therefore they should have had 15 percent applicants. Here you have the actual applicant flow data, and whether they in their process, for whatever reason, are either accepting or rejecting these people; is that correct?

A. It is a more specific figure, yes.

Q. All right. And now with regard to these rates, what is the rate at which those blacks who are applying are actually hired by the bank?

A. 3.5 percent of the blacks who applied to the bank were hired. 14.8 percent of the whites who applied to the bank were hired.

Q. All right. So the difference is about four to one, about four times as many whites who applied—or the hiring—the rate of hiring the whites is about four times higher than the rate of hiring the blacks; is that correct?

A. Yeah, you could look at it that way.

Q. And when you look at it in terms of officers extended; in other words, offers that were extended whether they were actually accepted or not, what is the black rate at which offers are extended?

A. Okay. Are we on table—

Q. Table 10, now, Exhibit 10?

A. Exhibit 10?

Q. Uh-huh.

A. Okay. If you look at it that way, you see that the bank made 95 offers, of which 6 percent were to blacks, and that compares to 21 percent black in the applicant pool.

Q. Now, looking at Exhibit 10, I think there's six blacks that were given offers. Am I correct?

A. Okay. That is 4.2 percent, or six of 144 blacks who applied got an offer.

Q. Okay. And then how many whites received offers?

A. 16.7 percent of 533 who made an offer.

Q. Okay. So, once again, what we've got is about the same ratio of whites to blacks with regard to their ratio of offers. It is about the same, about four to one; is that correct?

A. Yes, sir. That is right.

Q. And, now, what type of statistical test would you use or analysis to determine whether or not the race of the applicants may be a factor in the figures that you are getting for the rates of higher hire, knowing that the rates of hire are quite a bit higher, four times higher for whites than blacks.

Is there some statistical test you can use to find out whether that is significant, or whether that is statistically significant?

A. Yes, sir. You could, of course, just look at it and look at the table by itself, but there is a test, it is a chi-square test. It's a very simple test which just tells you whether the numbers which you get in the cells or in the parts of the table are unrelated or related to what is in the margins of the table. And the interpretation of the chi-square is, what chances are there that this distribution could have occurred, were not some other factor operating.

Q. All right. With regard to the chi-square analysis, is it used, is it standard or used—is it used frequently in the social sciences to determine the validity of certain conclusions made by analyzing statistics?

A. Yes, sir. It is commonly used.

Q. And what is the significance level that social scientists generally accept as being a level that—at which they feel that the data is from a statistical standpoint significant?

A. Okay. There isn't any single point. If the population sample were quite small you might look at point 1. In most cases people look at .05 level. You could also look at the .01 level, but the .05 is the most commonly used one.

Q. And that means that this would not occur at chance greater than five times out of a hundred; is that correct?

A. Yes. What it means is that the chances of this distribution occurring were, were one of the variables not operating, is less than five in a hundred.

Q. All right. Now, looking now at Exhibit 9, you performed a chi-square analysis on that exhibit, did you not?

A. Yes, sir.

Q. And what is the significance level of the chi-square analysis there?

A. The chi-square significance at .0001, or one in 10,000.

Q. All right. And if we were then to state what that exhibit shows—let me see if I can state it correctly—that if the Fort Worth Bank & Trust was not considering race in their hiring of potential applicants, what are the chances or the odds that this distribution that we have seen, the number they have actually hired out of the persons that have actually applied, would occur?

A. It's not very probable. The probability of getting that few a number of blacks or that low a percentage of blacks actually being hired vis-a-vis the whites is not just very probable. The chances of that happening just by coincidence are one in about 10,000.

Q. All right. So there would only be one in 10,000 chance of getting this kind of distribution, simply a chance, were it not in this case the race variables entering into it; is that correct?

A. Yes, sir.

Q. Is that—is that the type of probability that social scientists would consider to be a very, very distant probability in the real world?

A. Yeah. As the chi-square probability goes down, what it means is your finding is more and more important and it can't be explained just by chance. So as the chi-square probability goes down from .01; that is, one in 10, or one in a hundred to one in a thousand to one in 10,000, what it is saying is that basically the chances

that you just could have come across this table without any extra something operating are just getting more and more remote. Hence, it's a stronger and stronger finding.

Q. In other words, there is the stronger finding than the probability of .01 or .05?

A. Yes, sir.

Q. In other words, quite a bit stronger finding; is that correct?

A. Quite a bit stronger.

Q. All right. When you applied the chi-square analysis to the offers in Exhibit 10, you received the same kind of statistical significance; it is one in 10,000 or .001; is that correct?

A. Yes, that is right.

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[II Tr. of Trial 125:]

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Q. Tom, I believe where we were, when we broke for lunch, was with the Exhibits Nos. 11 through 21, and these exhibits showing basically this same—derived from the same data, the same applicant flow information and broken down by positions.

A. That's right.

Q. And the—with the understanding that where it says "larger pool," that was simply where you took into account those who had "open" on their applications apparently, and on the applicant flow log and where it didn't say "larger pool," than it did not include those categories; is that correct?

A. Yes, sir.

Q. All right.

* * * *

[II Tr. of Trial 126-28:]

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A. Basically what this does is not look at the whole pool altogether of applicants but break them down by

the kind of positions they applied for. You could apply for a secretarial position, a teller position, kind of a catchall clerical position and a—basically a blue-collar or nonprofessional position.

What we did is, we looked at the percentage of white and blacks who had applied and gotten offers in each of the several different areas and we looked at it by the strict test; that is, the test in which you specifically apply for a position, and also by the loose test, which includes those who put "open" on their application.

What we find is that in each of these instances white people, white applicants were more likely to be hired than black applicants. That is true, I believe, for each of these exhibits.

In several of these exhibits, that difference provides a statistically significant result at .1 or .05 or .01 or better.

Q. All right. And in some of them you have a small number, a small sample, do you not?

How does that affect the significance on those?

A. That is correct, when you have a very, very small number. Now, back here in Exhibit 20, these are the people who applied for messengers, maintenance and mail clerks, the nonprofessionals. There weren't very many. Only 14 people applied apparently for those. They hired two whites; no blacks. Still, this isn't going to be a significant result. The numbers are just too small.

Q. All right. But are the percentages, the rates of hire of whites in every instance greater than the rates of hire for blacks?

A. Yes, sir, they are in each instance.

Q. All right. Now, I want to go on, then, to Plaintiff's Exhibit 22, and ask you what—actually, we're going to take this group of exhibits again, 22, 23-A and 23-B; and I'll ask you, starting with Plaintiff's Exhibit 22, what that exhibit shows with regard to the hiring of employees at the Fort Worth Bank & Trust?

A. Okay. This class goes on for over, I guess it is, four years. And during this time period, there were certainly different cycles in the bank's hiring. At some time they hired a large number of their applicants. At other times, perhaps because of the recession or whatever, they hired very few.

So what I was doing here was looking for the possibility that they hired few blacks because blacks applied at the wrong times. For example, if blacks applied when they weren't doing much hiring, then it might be a natural result of this fluke that they hired few blacks. So what I did, was I broke it down into nine six-month periods, beginning in the first and generally running from October through March, and then subsequently April through September.

So you end up with nine six-month periods.

And in five of those, they hired over 10 percent of their applicants. In four of those 10-month periods, they hired under 10 percent of the applicants. And that's what this table reports. It reports the numbers of whites who applied when they were hiring very few applicants and the number of blacks they did, and then it reports the number of whites who applied when they were kind of going full-gun there and hiring a lot of people, more than 10 percent of the people who applied, and similarly with blacks.

Q. All right. What does that table show, because the chi-square shows it is .37. What would that indicate?

A. The chi-square indicates that blacks and whites did not apply at significantly different times, vis-a-vis the bank's hiring cycle periods.

Q. In other words, they were pretty well distributed between relative to race in the periods when they were hiring a lot of people and the periods when they were not hiring some people?

A. That is right. It wasn't the case blacks applied only when they were hiring few people and whites ap-

plied when they had a lot of positions opened. They were more distributed than that.

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[Tr. of Trial 129-32:]

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Q. Now, what—23-A and B, then, analyzes offers in these hiring cycles, does it not?

A. That is right. It breaks down table 22 into looking at the low hiring cycles and the high hiring cycles and asked what happened during those periods.

Q. And once again, are the—as between blacks and whites, do blacks continue to be discriminated against in the manner in which the offers are made in the high hiring periods, as well as during the low hiring periods?

A. Overall, that appears to be the case.

When you look at table—Exhibit 23-A, here are the times in which the bank wasn't hiring very many people. That is, they were hiring less than 10 percent of everybody who applied to them.

Now, during that time of slow hiring, they hired 3.9 percent of the blacks who applied and 11.2 percent of the whites that applied. If you want to look at it the other way around, they made 32 offers, three of them to blacks. That's 9 percent of the offers to black, versus 23 percent of all the applicants then who were black. And that is significant at .05.

Q. And then 23-B analyzes that same information in times of when they were hiring over 10 percent of the applicants; is that correct?

A. Correct. There were several six-month periods in which the bank must have been picking up in their hiring or something, and they hired more people. And in this time period, these six-month periods, they hired 4.4 percent of the blacks who applied and 21.9 percent of the whites who applied. If you would like to look at it again the other way, they made 63 offers. Five percent of those were to blacks. Although 20 percent of the ap-

plicants at that time was black and this is significant at .001.

Q. Now, I want to ask you at this point to go over with me Defendant's Exhibit No. 2, which I think should be in this stack right here, because—yeah. Here it is right here. This is your copy.

And here Mr. Shipp did a table. Once again, taking from the same kind of—from the same data, but what he did was he assumed kindly that—and just looked at the blacks on either side of—

THE COURT: Well, on one side of the hire. In other words, he went back two weeks from the date of hire, and he looked at how many blacks applied and how many whites had applied. Okay?

And so from—

BY MR. BRENDER:

Q. What he did was, he went back and looked at jobs in which blacks have applied within that—within that two-week period, or that 14-day period actually. I should say 14 days.

A. I am sorry. There is a black application within 14 days of hiring?

Q. Well, it's going to precede the hiring by 14 days, not within it, because they would simply go backward in time two weeks to see how many blacks and how many whites applied for each of those 35 jobs. And as I understand his figures, he found that for these 35 jobs—what he did was, he in essence selected about 35 jobs and looked at the people that applied for those 35 jobs, and he found that for those 35 jobs, there were 63 black applicants, and there were 108 nonblack applicants. All right?

Now, you can apply this same kind of chi-square analysis to this in light of the successes.

We'll look first at the higher rates. And we have—we have five blacks.

A. That's five of 63 blacks who were hired?

Q. Right.

And we have 30 whites, and then, of course, if you want you can look at it in terms of offers; and there were seven blacks that were extended offers and 33 whites.

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[II Tr. of Trial 132-34:]

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Now, if we analyze this, and use the chi-square analysis, what is our black hiring rate in—let's use hirees first.

And what would that be?

A. Five and 63?

Q. Uh-huh.

A. You cant a percentage?

Q. Yeah, just a percentage of black hiring rate.

A. About 8 percent.

Q. All right. And then the white hiring rate?

A. It would be about 28 percent.

Q. It would be 28 percent?

A. Yes. That's 30 of 108.

Q. Okay. In other words, very similar to what we found in the analysis we did when we analyzed the whole sample; is that correct? About a four—well, a little less than four. This one is a little more about than three to one?

A. Three to one, yeah.

Q. Okay. Now, when you did the chi-square analysis, did that indicate a significant result in the hiring rates, given the sample they chose to analyze?

A. On that table?

Q. Yes.

A. Yes. The chi-square significance is at .01.

Q. .01.

In other words, statistically speaking, we still have the same situation we had when we analyzed the whole sample, and for the most part we broke it down even, and that is that taking only these jobs in these two weeks

before a black happened to apply, we still got a statistically significant result because of the great discrepancy in the hiring rates between white and blacks; is that correct?

A. That is what I assume that these figures mean.

Q. And, once again, assuming these figures are correct and Mr. Shipp did an accurate count in arriving at the sample, what we have is a situation where the—where something other than—even if you were saying, "We're just going to look for qualified people," race was a factor here or at least it would be very unlikely, very improbable that race was not a factor, given this sample of the hiring status; is that right?

A. Yeah, about one chance out of a hundred.

Q. All right. Now, in that—and social sciences consider that to be a statistical significant and statistical analysis does, too, does it not?

A. Virtually always.

Q. Now, if we want to look at the offer rates, or the offers as opposed to the hires, what rate of offers do we have?

A. Okay. To blacks—is this seven out of 63?

Q. This would be seven out of 63, right.

A. Okay. That would be 11 percent—

Q. 11 percent for blacks?

A. —who got an offer.

Q. Okay. And then what about—I have been saying "whites" but really I should say "nonblack," here because they did include those others in the sample.

A. It would be 33 divided by a total of 108 who got an offer, which would be 31 percent.

Q. 31 percent for whites; right?

A. Yes. I think that is nonblacks, but, yes.

* * * *

[II Tr. of Trial 135:]

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Q. All right. But now, then, give this rate of hiring, once again, about three to one, white over blacks. These

are offers, anyway, not hiring. Excuse me. Offers. Is that a statistically significant result also?

A. Yes. That's significant, again, at .01; with the same interpretation.

* * * *

[II Tr. of Trial 135-36:]

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Q. I want to skip over to Exhibit 31 for just a minute.

A. Exhibit 31?

Q. Uh-huh.

A. Okay.

Yes.

Q. All right. Now, in this exhibit, you analyzed those people who were involuntarily terminated and you once again broke it down by race; is that corect?

A. Yes. That is right.

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[Tr. of Trial 137:]

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Q. All right. And the percentages show that blacks are—blacks are terminated at a rate that is about twice that of nonblacks; is that correct?

A. 20 percent versus 11 percent, yes, sir.

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[II Tr. of Trial 137:]

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Q. Now I want to go to Plaintiff's Exhibits 24 and 25.

And these exhibits analyze the departmental segregation by race at the Fort Worth Bank & Trust; is that correct?

A. Yes, sir.

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[II Tr. of Trial 138-39:]

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Q. So the data base does not include the officers and those sort of people at the bank. It just includes the graded positions. So we are not trying to find out or trying to crowd into this analysis the officers and the vice-presidents and people like that, but, rather, we're just using those people who were considered to be graded employees.

And what does Exhibit 24 then show us?

A. Well, it shows that there are no black persons, no blacks spent time up in the nonoperations department, but rather, all blacks spent all of their time in what we've described here as operations.

Q. All right. And what we did was—I guess I forgot to put that in there. This calculated the number of months during the data period, the sample period of the data in which they were employed in those type jobs; is that correct?

A. Yes, sir.

Q. All right. And then for nonblacks, the months were as you recorded there 15 percent were in nonoperations and 85 percent were in operations; is that correct?

A. Yes, sir.

Q. And did you perform statistical tests on this data, too?

A. The chi-square, that is the probability of getting that is less than .001 or less than one in a thousand.

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[II Tr. of Trial 139-40:]

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Q. Now, Exhibit 25, you added an additional factor to the operations, nonoperations analysis that you had—you had just completed. You actually here were just analyzing the nonoperations departments; is that correct? I mean, pardon me, the—the openerations depart-

ments. You were breaking that down into public and nonpublic jobs; is that right?

A. That has to do with the apparent amount of visibility.

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[II Tr. of Trial 141-42:]

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Q. So the Court will know, what jobs were considered to be public jobs and what jobs were considered to be nonpublic?

A. Public jobs, as I can tell, came out to safety deposit box, loan discount, switchboard operator tellers, security guards, bookkeeping, new accounts.

Q. All right. And what were were the nonpublic jobs?

A. Proofs, mail messengers, lunchroom attendants, check printing, ATM representative.

Q. Okay. And once again, did the—was there an indication of discrimination in the—when tested out in this manner, of the placement practices at the bank?

A. Well, there are some differences in where blacks and nonblacks end up. And the first one, most obvious one, which comes from the last exhibit is that there are no black people spending much time up in nonoperations but we have already looked at that.

When you look at the public operations races, you find that among the people, all the people in public operations or among all the time spent there, 15 percent is by black. 15 percent of the time there is by black employees. Whereas if you moved down into the nonpublic operations with less frequent contact, down there 29 percent of all the person time is by black employees.

Q. All right. Once again, we have calculated the person time as the number of months they were in those jobs; is that correct?

A. That is the way it was calculated. That is significant at .001. That is, the chances of getting that

table without anything else operating is one in a thousand.

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[II Tr. of Trial 142-44:]

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A. That's what table 26 does.

Q. All right. And what does the—what do the results of—First of all, explain to us what the first, second, third, fourth evaluations are?

A. Okay. An employee who was there could have several evaluations if they stayed for quite a long time. Actually, as you get down toward the fourth and fifth evaluation, there really aren't very many people down there.

So, the first and the second evaluation and maybe the third evaluation is, and maybe even the fourth one, is more interesting because that is what people are getting evaluated on the average for these two groups.

And on the first evaluation, for example, nonblacks had an average evaluation of 78, and blacks an average evaluation of 63.

Q. Okay. And then on the second evaluation, it was 82 and 69; is that correct?

A. About 83 and 69.

Q. All right. And then, once again, the average for nonblacks, 85 and 74; is that correct?

A. For the third evaluation, and then 86 and 75 on the fourth evaluation.

Q. Okay. And did you apply tests of statistical significance to these figures also?

A. Yes.

These are F tests, and you compute a significance on these. That is, if they were quite close they wouldn't be significant. As they get larger or as you get more cases, you get—tend to get greater significances and all of them are significant at least at the level of .05 or five chances in a hundred. Some of them are significant at a level of

one chance in a hundred, and then the first evaluation is significant at the level of one in 1,000.

Q. Okay. Now, why did you use a different test, a statistical test to show the analysis in these cases?

A. Because what you have got here is not whether they are hired or not, or offered or not offered. You have a variable which is their score which can be 30, 40, 50, 60, 70, 80, 90, 102 or something like that. It is the ratio variable, and I wanted to see what the the mean score was between these two groups, and that is why you use an F test.

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[II Tr. of Trial 145-46:]

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Q. Now, Plaintiff's Exhibit 27, what does this correlation—what were you doing here?

A. Okay. The question was, do people change much in their evaluations; for example, if you had a first evaluation, you had a bad score, what's the probability that you would have a relatively low score on the second evaluation as well?

And so what I am doing is comparing what people got on the first evaluation to the second evaluation, what they got on the first evaluation to the third evaluation, what they got on the first evaluation to the fourth evaluation; and seeing how similar those scores were.

What's reported in this table is a table of person-promoted correlations. The higher these go, the stronger the relationship. They can go up to 1.0. If there was no relationship at all, each of these would be about zero. In fact, if they were negatively related—that is hard to imagine why they would be, but they could be—you would get negative scores and what you see after the first evaluation, actually each evaluation with the next is quite highly related.

Q. All right. And what this is saying is that really over a continuing, the evaluation scores don't seem to

change a whole lot from one year to the next. Is that what we are saying?

A. There is a tendency for people who score high on, say, early evaluations to keep scoring high on subsequent evaluations. Incidentally, each of those coefficients reported in the matrix there are significant at .001.

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[II Tr. at Trial 147-48:]

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Q. Okay. Now, beginning with Plaintiff's Exhibit 28, you used a different type of statistical analysis or somewhat different type of statistical analysis than we have talked about before, one known as a multiple regression; is that correct?

A. Yes, sir.

Q. And can you explain for the Court and for me what, basically, does a multiple regression do?

A. Okay. A multiple regression is a procedure to analyze data. Let's say that you wanted to look at the effect of race on the independent or the independent variable, the first evaluation. You could look back a couple of tables ago or couple of exhibits ago and you would see that blacks got lower first evaluations on the average than did white people at the bank and thought it to be very interesting, and then you say, "Well, what if this has something to do with how long they have worked at banks or had experience before they came here." It might be, for example, that blacks just didn't have a whole lot of experience and so naturally, they got lower evaluations and that's not implausible; or, what if it was graded higher. That is, people—blacks come in lower, for example, at this bank on the average; and it might be that people down in low grades don't quite adjust as well and therefore, they get lower evaluations.

So, if you took out the effect then of where they started, race itself wouldn't really have an independent effect.

And that's what you are trying to do.

Now, this is impossible virtually; not completely, but it is virtually impossible to do without a little regression program and a procedure.

What you do first is basically say, "I want to look at the first evaluation. I want to try to figure out what is going on with the first evaluation. And I think that race has something to do with it. I think race is related." But it is possible that once you took out the effects of their previous experience when they got hired and once you took out the effects of wherever started on the job scale from one up to nine, that race really didn't—I mean there isn't any separate effect of race. And that is a way of controlling for the effect of race.

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[II Tr. of Trial 150-51:]

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Q. All right. And this first exhibit, Plaintiff's Exhibit 28, the thing that you have called the dependent variable, is that what what you are attempting to evaluate, the first evaluation and then the second evaluation?

A. Right. The question is—and the question was asked earlier: Are blacks getting lower evaluations, and you can see that they are simply by looking at the total averages; and are they getting in a sense evaluations which are lower than similarly placed white employees, that is, those with similar experience at the time they are hired and those of a similar grade when they are hired.

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[II T. of Trial 152-53:]

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Q. What did that show?

A. What it shows, is actually when you control for those two variables, their prior experience in banking and related industries, plus where they came into the bank—that is, at what job grade—that two similarly

situated employees, one black, one not black, would end up being predicted to get two very different scores. That is, the black employee would be evaluated on the average at 34 points on this scale lower than an identical white counterpart.

Q. All right. And what about the second evaluation? Would that hold true also?

A. Yes, it holds true. It is about 40 points different.

Q. All right. This doesn't mean that they would get a score of 30 points or 40 points lower, does it?

A. No, there may be nobody who is hypothetically identical.

Q. All right.

A. But this is the disparity between the coefficient which is attributable to race.

Q. All right. In other words, this is factoring out—when you factor out these other variables, you are looking solely at the effect of race and not at the other variables; is that right?

A. That is right. The coefficient is for race entered last in the equation.

Q. Okay. We'll offer Plaintiff's Exhibit 28 into evidence, Your Honor?

A. Incidentally, both of those coefficients are also significant at .001.

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[II Tr. of Trial 157-58:]

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Q. All right. Now, I want to discuss, then, Plaintiff's Exhibit 29.

This summarizes in summary in a, simply an average fashion, some of the statistics that we will talk about a little bit in Plaintiff's Exhibit 30; and once again from the data base, does it not?

A. Yes, sir.

Q. What is the exhibit? What is the first thing we are analyzing between races and promotions and compensation?

A. Okay. There are four things that we are looking at here. The first is annual average increases in grade. That is how much on the average a nonblack or a black comes up in the bank every year, and these first two, I should add, are computed only for employees who have been there over the year, since it really doesn't make any sense to be computing average annual increases for people who haven't been there one annual.

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[II Tr. of Trial 159-60:]

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Now, then, what does that show when you analyze that?

A. Okay. What it shows is that if you are black you'll go up at about an average rate of .18 job grades a year on the average, but if you are nonblack, you go up .53, job grades a year on the average. The difference is about a third of the job grade.

Q. Okay. Now, of course, people don't really go up a third of a job grade or a half of a job grade like that, but these are the averages when you look at it over that period of time; is that correct?

A. Average figures, yes, sir.

Q. And looking at it rate-wise, the rate was about three times the rate for nonblacks as for blacks; is that correct?

A. Between two and three times as great.

Q. All right. Now, what does the next category—what does that include?

A. Okay. This is a similar figure for how much people go up on the average in salary, from whenever they started or at the start of the class to the end of the class or if they left early or whenever they left, and then it is recomputed to analyze basis. And again, these are only people who have been there over a year since it really didn't make a lot of sense to give average annual figures who weren't there one annum.

Q. They weren't there in time to get a raise, if they weren't there a year.

A. Well, weren't there for one year.

Q. Okay.

A. That comes out to 14.9 percent for nonblacks as an average annual raise, and 12.0 percent for blacks as an average annual raise.

Q. All right. Now, what is the next category, average final grades?

A. Okay. This is the grade at which they ended up at the end of the class if they were still there, or where they ended up whenever they quit, whenever they left the bank, for one reason or another.

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[II Tr. of Trial 161:]

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Q. All right. And the average for nonblacks was 5.2 grades and 4.13 for blacks; is that correct?

A. That is right. A little over—well, almost 1.2 grades difference.

Q. Okay. And the final figure, I guess, is self self-explanatory. Is it an average salary figure; is that correct?

A. Yes. This is the average salary for everybody. Now, this includes people and whatever their annual salary was when they left. If they were still there at the end of the class, that is the figure we used. So this includes some people who left a little bit earlier or left sometime earlier. Whatever they were making then, that is what it is.

[II. Tr. of Trial 162:]

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A. So, here we get about $56 difference over the whole time period taken together, and if you take just then the period—people who were there at the end of

the class, there's a $38 average difference; but it should be noted that they are computed somewhat differently.

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[II Tr. of Trial 163-66:]

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Q. All right. But to look at average salaries or grades or things like that does not take into account, as we mentioned before, some of the other variables are to—to take out, for instance, what might be the effect of the grade that they were in or the evaluation scores that they got or the amount of tenure that they have, whether that be short or long, and so Exhibit 30 analyzes some of those—those considerations and attempts to see if those considerations are playing a part in these averages; is that correct?

A. Yes, sir.

Q. And how did you do that?

A. Okay. What we have are three groups of regressions. The first regression, we're looking at average annual increase in grade; that is, how fast the people get themselves promoted on up.

Now, we know that whites get promoted on up on the average faster than blacks do.

Q. Yeah.

A. We know that from Exhibit 29.

But what happens if you look at education?

For example, it might be that they have vastly different educational backgrounds, but that's really the variable. So we control for that. It's a personal characteristic.

Okay.

The second thing we are controlling for or taking into effect is where they started. For example, if you started up in grade 7 or 8 or 9, you probably didn't have as far to go up. I mean, you really couldn't have gone up as far as if you started in a 1 or a 2 or a 3.

And so that was something we looked for, so it controls for those two things.

Q. In other words if you were to say, "Well, sure, Richard Burt, he came to the bank and he worked his way up. He was an officer and worked hard and that sort of thing but he was going to college and getting some education along the way." And so he probably was in a better position to work up through the grades faster than Clara Watson who didn't have the college education or didn't get a college degree or at least the number of hours in college during that period of time. And it also took into account the fact that if somebody had a lot of experience and they were hired in at a higher grade, they were not going to go too much further than that grade, and therefore, like somebody who was hired in at a 2 or a 3 and had a lot of room to improve. Is that what you are saying?

A. It is hard to tell how it works. I mean, it may be people that come in at a 1 or a 2 just don't get promoted, but people that come in this higher grade, they just jump right up. But you have got to find out about that.

Q. We were trying to solve the problem and see whether those variables really counted and whether race would still be a factor, if we took into consideration the education and the grade in which they first entered the data base; is that right?

A. That is right. It is possible that race would just wash out, that it would have no significant effects because all the effects were due to education and where they started out.

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[II Tr. of Trial 167-71:]

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A. You'll note that is, in fact, even stronger—curiously, it is even stronger when you control for education and their initial grade than what just the average was back in Exhibit 29. There the difference, the detriment

to being black was .35. Here, even when you control for some things, the detriment to being black is .6.

Q. Okay.

A. So it just can't be explained away, I think, that way.

Q. Now, then the next equation looked at what?

A. Okay. Here we were looking at the final job grade and it's presented three different ways.

You remember back in Exhibit 29 we looked at just the differences and we found there was a 1.16 difference between the final job grade of blacks and nonblacks.

And again the question is: Could that really be attributed to something else? Could it, for example, just be attributed to education?

Q. Okay. Let me interrupt you just a second.

Because when we are talking about the final grade here we mean either the grade at which a person left the bank, if they left any time during the applicable period of this data base, or the grade that they had on the date the data base was cut off, that being March the 1st of '84; is that right?

A. Yes, sir.

Q. Okay.

Go ahead. Now, tell us how you—what you controlled for or what you were trying to test.

A. Here I took out the effects of education. And as I entered the education for each person and then I saw what happened, and then I entered race last. And in a sense, this is kind of a rigorous test because to the extent that race and education are related, you are taking out part of the independent effects of race. I mean, so it certainly works in, I think, the bank's favor to do tests like this. That's how it is.

Anyway, what you end up with here is that blacks are about 1.22 grades lower at the end of their final job grade than a similarly situated white person.

Q. All right. And what about when you took into account experience at final date?

What variable were you using there?

A. Okay. Total experience at final date is their total experience at the bank and total appropriate experience earlier. It says their total experience, up until whenever it was that they quit and had a final job grade or if they are still there, whatever it is, at 3-1-84.

Q. So this took into account two things that have been discussed.

First of all, their prior experience. Is that correct?

A. Yes.

Q. Their prior experience before coming to the bank?

A. Yes, sir.

Q. And I believe in the data base, that was interpreted to mean the prior banking experience, if they were—in a teller or something of that sort, and I believe the way it was put was if they were a secretary, it was prior secretarial experience. So it was related experience to the job that they were handling.

And also their tenure during the time they were at the bank; is that correct?

A. Yes, sir.

Q. In other words, the amount of time that they had been at the bank?

A. Some of those two things, yes.

Q. And then you looked at how that affected—Okay. You looked also at race to determine how that affected final grade.

How did it affect it?

A. Well, once again, we find that these things being controlled for in black applicants was about 1.21 job grades lower than an identically similar white person at the bank.

Q. Wait a minute. You said black applicants.

A. I am sorry; black employees.

Q. These were all employees, of course?

A. Yes, sir.

Q. So once again, the experience both before or after hire and their tenure did not affect the final grade analysis, either; is that correct?

Now, what was the final equation that you used in the test on final grade?

A. Well, I threw in another three. I picked out education, because it is characteristic and it may be related to brain or skills or something. I picked the experience, their total experience at the final date, just like above. So I picked the two variables above, but simply instead of putting them in one at a time and seeing what happened, I put them in two in plus one more even, the first evaluation, how did the person do on the first evaluation.

Q. All right. Now, let me ask you this: Why did you put the first evaluation as opposed to the second or third or all the evaluations?

A. There are some reasons for that. First, if you remember, all of the evaluations are pretty closely related one to another. That is, low evaluations on one and low evaluations on the other.

Q. In other words, that is the correlation analysis that you did a little earlier?

A. Yes.

Q. Okay.

A. So it really didn't matter whether you put in one or two.

Another thing is, you like as large a number as possible, and so since a lot of people began dropping out there and they don't get their second or third or fourth evaluation, you would like to have a fairly low class number of people there. I think that's an important point.

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[II Tr. of Trial 172-74:]

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Q. And what did that show?

A. Well, it shows here that controlling for those things, a black employee ends up at 1.38 job grades on the average lower than an identically situated nonblack employee. And, again, the chances of getting a difference

between blacks and whites, that that's great. It's just like—it is about one in a thousand.

Q. And that was the same for each of those three grade figures that you calculated, would that be correct?

A. Yes, sir, that is right.

Q. Okay. Now, the final—the final analysis that we did was on the salary, the final salary, that being the salary when a person left the bank or their present salary, if they are currently employed; is that correct?

A. Yes, sir.

Q. And what variables or what considerations, what things did you put into the model to attempt to take into consideration all those things that might affect salary and that might be indicating race when race was not supposed to be indicated or vice versa?

A. Well, quite a large number of them. Just as above, we put in education. We put in all their prior experience. We put in their first evaluation and also their second evaluation, and then we put in the midpoint of the salary range for whatever their final grade was. That is what the midpoint was for that salary range for each person's final grade.

Q. Why did you put that in?

A. Well, it simultaneously controls for what their final grade was, and it also to some extent controls for the time there, since the midpoints of salary ranges per grade goes up over time.

Q. Okay. So this really was controlled for that but also for their grade because that would indicate what their grade was. The midpoint would be where they should be salary-wise; is that correct?

A. It controls for that, yes.

Q. All right. What did that analysis show?

A. What it showed that if you put it in this way, and then you put in race last, race still has a coefficient of minus 45.98, which means, again, your hypothetical black employee is getting about $46 less a month than

an identically similar hypothetical white employee at the bank.

Q. All right. And this is looking at their final salary by the month—right?—the final monthly salary.

A. That is a monthly, not an annual salary.

Q. All right. And this would show—this would indicate about a $45 per month—

A. 46.

Q. $46 per month average less—or average salary that would be less for blacks than whites; is that right?

A. Yes, sir.

Q. And that—when we go back and look at Exhibit 29, that compares very favorably to the percentages that be calculated when we simply averaged the salaries. It's a little less, because some of those variables apparently did. Race was not accounting for all of it like you would think. We simply averaged it, but there was some taken out for some of the other, experience and education, that sort of thing. Is that correct?

A. Yes, sir.

Q. Okay. And now, the—once again, was this statistically significant also?

A. Yes, sir, it was statistically significant condition at .05.

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[II Tr. of Trial 175-76:]

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Q. Okay. Let me ask you a couple of things just in summary: In your opinion, do the figures and the analyses that you performed as accurately and as fairly as you can do, take into consideration all the possible explanations or reasons why blacks fare not as well, why blacks don't fare as well as whites in these various, be it salary or promotions or in their very rate of hire?

A. Yeah, they are race-related differences, most of them significant in all of those variables, both in the hiring part and in the treatment of present employees.

Q. And when you look at them, not only individually as we have here but as a whole and across-the-board, do you get a consistent pattern of discrimination occurring?

A. You get a consistent pattern of race related differences, depending on how many people you have and what the—the number of characteristics you are talking about. Sometimes it is stronger than others, but it is very very consistent in one particular direction; yes, sir.

Q. Okay.

A. And, frankly, I think that that consistency is about equal or more important than any single figure or the significance levels. I think that there is a consistent pattern that you need to be looking at. That is a personal view.

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CROSS EXAMINATION BY MR. McGEE

[II Tr. of Trial 180:]

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Q. It is true, is it not, the size and sample affects the result, as well as the type of test that someone uses in this type of analysis?

A. The size of sample can affect it but not in all situations.

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[II Tr. of Trial 182-84:]

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Q. And where you look at the black and the white hirees—first of all, as you have already testified, you did not consider nonblacks; you just considered whites; is that correct?

A. Whites and blacks.

Q. Okay. I believe you testified that in your opinion, the exclusion of Hispanics and Orientals or other ethnic groups would not have had any significance on your results; is that correct?

A. The reason I selected them was because I wanted to compare blacks and whites.

Q. Well, the reason you selected them was because that is what you were instructed to do, really, wasn't it?

A. Yeah, I was asked to compare blacks and whites.

Q. Okay. So you didn't—you formulated the tests to meet the end, is really what it amounts to. You didn't try to take an objective look at the bank and try to determine what was going on; you were trying to reach your result?

A. No, I don't think that is an accurate statement.

Q. My question really was: Is it your opinion that the exclusion of those Hispanics and Orientals and other racial groups is not a significant—does not have any significant effect upon your results?

A. I don't know whether it would have a statistically significant result on any of these. I never analyzed them.

Q. But practically speaking, we are talking about 29 people, are we not, 28 people, I believe?

A. 28?

Q. 28.

A. 28 what?

Q. People that are Hispanic or Oriental or other racial groups that are not either white or not black?

A. Just a second.

I have 28.

Q. 28; is that what you have?

A. That is what I have.

Q. All right. That is—at any given time, that represents more people than there are blacks at the bank, does it not, roughly three—really, over three times as blacks as there are currently employed at the bank?

A. Are you comparing the number of Hispanic and Oriental applicants to the number of black employees?

Q. Yes.

A. Yes. Yeah.

Q. Now, 28 people is not insignificant. You would agree, would you not?

A. Well, the problem is that my data base here is 768.

Q. And you have not tested that, so you don't know whether it is statistically significant or not?

A. What's significant?

Q. The 28 people that you excluded.

A. Have a statistical or significant—a statistically significant part of the 768?

Q. Well, whether their exclusion would affect the results that you put onto these exhibits, the results that you have gotten from your analysis?

A. No. I think I can answer that I excluded Hispanics; Oriental, and the missing data and never analyzed them again.

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CROSS EXAMINATION OF GARY WAYNE SHIPP BY MR. BRENDER

[II Tr. of Trial 218-19:]

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Q. Now, page 157 of the transcript of the class certification hearing, which was held on June the 24th of 1982, I asked you—Pardon me. I think it's at page 140 of the transcript, I asked you at line 7—okay—in that connection—sorry; my page is a little wobbly here—

Question: Are you the person who is responsible for hiring at the bank?

Answer: I'm in charge of the personnel department.

Question: Okay. And I take it on personnel decision, hiring, termination, et cetera, I suppose that's termination, et cetera, you obviously asked for input from others within the bank, but I take it you have the ultimate final say in these decisions; is that correct?

Answer: Yes, I discuss it with the supervisors when a decision is made by them.

All right. Now, you are saying now that these decisions are solely up to the supervisors; is that correct?

A. Yes, sir. I'm not—I am aware I said those things and I don't feel like that I explained it thoroughly.

The purpose of me discussing with the supervisor is to see that the value rate fits within the ranges that we have established for that job. To go from there and check references, credit check, you know, that sort of thing. As far as making a decision, I do not sway their decision in the least. They choose the person they want to hire: I don't hire them for them.

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[II Tr. of Trial 219-20:]

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Q. I see. Okay. Now, I want to ask you if during the period of time following the period of time starting in 1980 after Clara Watson had applied for and been turned down for the two teller jobs or supervisor jobs we discussed previously, did she become the assistant to Mr. Burt, Richard Burt that we have discussed before?

A. You are talking about after the 1980—

Q. Yes. In 19—

A. Yes, approximately February of 1980, I think would be the correct timeframe or thereabouts and right after the decision was made to made to make Mr. Burt the teller lobby supervisor and Pat Cullar the supervisor in the motor bank.

A. Okay. At that time, Richard Burt and I met with Clara. And it was anticipated that Richard had other duties besides just supervising the tellers, and we wanted to know if—really, if she would be interested in, while he's away, taking care of certain functions for him.

Q. Well, did you make her his assistant?

A. The word "assistant," as far as I am concerned, was never used; as far as being designated title.

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[II Tr. of Trial 221:]

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A. She assisted him in certain functions of that job, none of which had to do with supervisory reviews of employees and that sort of thing.

Q. Did she assist him by by interviewing some of the people that came to the department when he wasn't there, seeking employment?

A. I was not aware of any if she was.

Q. Are you really aware fully to the extent of the supervision she was giving to the department at that time, or to Mr. Burt?

A. Basically, yes.

Q. How were you familiar with it?

A. Well, that's the kind of thing that he would tell me what is going on.

Q. Okay. Now, with regard to these decisions to not promote Clara Watson, I want to take them both first in 1980.

The only reason that you advanced at that point—for not promoting her to the job of supervisor of the motor bank, I believe, was that she lacked supervisory experience; is that correct?

A. In the motor bank in when, 1980?

Q. In 1980, when Pat Cullar got the job.

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[II Tr. of Trial 223:]

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A. Okay. As I recall, that was the main agreement in that decision.

Q. All right. But Pat Cullar didn't have any supervisory experience, either, before she took the motor bank job, did she?

A. No, she did not.

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[II Tr. of Trial 224:]

Q. Now, we've discussed this situation about there was a 90 day period when you would advance somebody and they wouldn't get the pay raise for another 90 days; isn't that correct?

A. That is generally the policy, yes.

Q. All right. Let me ask you if that was the policy when Pat Cullar became supervisor of the motor bank on 2-15 and 80.

She was given an increase was she not?

A. It appears that she was, yes.

Q. In other words, she was given an increase right at the time this selection was made. She didn't have to wait 90 days, did she?

A. That appears to be right, yes.

Q. Okay. Then looking down, she got another increase on 9-80, which was apparently her regular annual review. In fact, she got a $79 increase on the 15th of February of 1980.

In September of '80 she got a $70 increase, apparently pursuant to her annual review, and then on 2-1-81 she became the inside supervisor of the lobby; right?

A. I believe that is right.

Q. And then she got a $95 a month raise on that same day; right?

A. That appears to be right.

Q. So she didn't have to wait the 90 days before she got her raise, did she?

A. That appears to be correct.

[II Tr. of Trial 228:]

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Q. And then let's look at the next review. This is after she was lobby supervisor, page 5 of that next review, "In what areas does she need improvement?" and it says—Are you to that one yet?

A. Yes.

Q. Okay. "Overall experience and supervising people," where she needs some improvement.

Is that correct?

A. That's what it says.

Q. All right. And where it says on the last page where there are some written comments, a little hard to read, but No. 3 says leadership, again, "Experience is

needed. Remember to give credit when due, as well as criticize."

A. Where are you reading there?

* * * *

[II Tr. of Trial 229-30:]

* * * *

Q. Who was the person that reviewed her in this? Was this your review of her?

A. Yes, I filled this review out.

Q. Okay. These were your comments yourself?

A. Yes, sir.

Q. And your observations of her as a supervisor; is that right?

A. That is correct.

I think if you will look in a lot of our supervisor reviews—in fact, we mentioned that yesterday—talking about there's comment made about them needing more supervisor experience.

Q. Well, I understand that these are supposed to be done in a constructive manner and so forth.

But what the point is, you are basing this decision solely on supervisory experience, and what you have here is a person who was actually somewhat inexperienced in supervision; is that correct?

A. I don't think any of us are experts in supervision. That is the whole point.

* * * *

[II Tr. of Trial 232-33:]

* * * *

Q. Let me ask you to look at the Plaintiff's Exhibit No. 1, which is Richard Burt's employment application and once again if you will turn on the employment history page, there are two pages of his employment history. I am looking at the second page.

A. Okay.

Q. All right. Now, once again, he was another one who received his wage increases at the same time he got his promotions, did he not? He didn't wait the 90 days. If you look, he's had two or three of them there.

A. Okay. We're talking about in '79? Bookkeeping supervisor?

Q. Yeah.

Well, he was supervisor—bookkeeping supervisor and looks like to me that he got a raise right away and then when he was made assistant cashier of bookkeeping, I guess that was, he got then on an annual salary; and then when he was made assistant vice-president, I take it that was really when he was also the lobby supervisor. Doesn't say that on the sheet, but that is the job that he had at that time from the earlier testimony.

He got his raises right away did he not?

A. Normally in the officers' categories when they are promoted they get a raise at that time; a little bit different. In the bookkeeping supervisor situation, he had been in that—had been assisting in that particular job for some months.

Q. Okay. And look at Plaintiff's Exhibit 3, which is Kevin Brown's employment folder, personnel folder. Once again, look at the employment history.

* * * *

[II Tr. of Trial 233-35:]

* * * *

Q. Now, when he was made motor bank supervisor, the job that Clara Watson had applied for on 2-1-80, he received a raise right away. He didn't have a 90-day wait, did he?

A. It appears that is correct, yes.

Q. All right. And were you the one that made the decision to advance Kevin Brown over Clara Watson?

A. Ultimately I was involved in it, but I was—the recommendation was made to me by Richard Burt.

Q. Why was he advanced over Clara Watson?

A. Who?

Q. Kevin Brown.

A. There was a lot of criteria involved that I am not totally aware of, and the decision was made. That is the recommendation he had, and supervisory experience was part of the decision, I know.

Q. I believe that is what you testified to, once again—

A. Yes.

Q. —at your—at the class certification hearing, that—once again, on page 148, that—that we talked about the fact that he had only been employed there for about six months on a full-time basis, and was there anything—what supervisory experience did he have that Clara Watson didn't have as the assistant to Richard Burt?

A. Kevin had been a supervisor for Six Flags Over Texas.

Q. He had a summer job where he supervised some other kids, picking up some paper at Six Flags?

A. It wasn't really a summer job. It is what you would call a seasonal job. It was about 11, 10 to 11 months out of the year.

Q. And he had hardly any knowledge of the bank because he had only been there for a year or six—and six months of that part-time job; right?

A. Been there about a little over a year.

Q. And yet, you are saying that he—that he had greater qualifications than Clara Watson for that job?

A. The recommendation was made to me and that is the decision that was made, that he did, yes.

Q. But you don't think that he really did, looking back at it. Is that what you are telling me?

A. I'm not—I can't say that. Supervisory experience was a big factor in that.

Q. I see. You are saying in this courtroom today you feel like Kevin Brown was a better choice, had bet-

ter qualifications to be advanced on the motor supervisor job than Clara Watson.

A. I do.

Q. What is the basis for that now?

A. From the recommendation and the criteria that was submitted to me, the recommendation included the supervisory experience level that he had had. We justified that, and that appeared to be—that among other things, he appeared to be the best one for the job.

Q. About what were the other things that were recommended to you, other criteria?

A. The kind of job that he had done while he was in the motor bank, assisting Pat while she was supervisor there. His reviews that he had received, you know, proved that he knew what was going on there. And as I recall, of course, supervisor experience, previous supervisor experience had a great deal to do with it.

* * * *

[II Tr. of Trial 235-36:]

* * * *

Q. First let me ask you this: We talked about all of this experience. You have advanced people before to supervisory jobs that had no supervisory experience, did you not?

A. That is correct.

Q. In fact, I think Weatherly was one; is that right?

A. That is correct, yes.

Q. Who else?

A. Oh, goodness.

Q. Pat Krantz, I believe, was another?

A. Chazelle Kretsinger.

Q. Kretsinger?

A. Kretsinger was not really designated as a true supervisor, no.

Q. What did she—

A. She had responsibility for seeing a certain area of the bank got down but she really didn't fill out the review forms.

Joy Chandler is one.

Q. All right.

* * * *

[II Tr. of Trial 237-39:]

* * * *

Q. How about Linda Colwell?

A. Linda Colwell, yes.

Q. And Linda Brimer?

A. Linda Brimer, yes.

Q. Brimer. Excuse me.

Of course, Kevin Brown, did he have previous experience? You say he did have previous experience?

A. He did have previous supervisory experience, yes.

Q. What about Gail Leavitt? She was advanced without previous supervisory experience; is that right?

A. I believe that's right.

Q. And Richard Burt; he didn't have any previous supervisory experience, did he?

A. That is correct.

Q. And, of course, Pat Culler didn't have previous supervisory experience.

A. That's true.

Q. And all of those are white; right?

A. Right.

Q. Okay. I'm not going to be—Suffice it to say that by the time he left the bank, which was 9 months—well, let me put it this way: By the time he had a review in September of 1981, after he had received this job in February of '81, he was not getting a very high review for a supervisory person; in other words, the summary of his overall performance was fair. Maybe the performance comes close to being competent, but the need for further development is recognizable; is that right?

A. Yes, he was having some problems.

Q. And they were problems in dealing with and supervising the people in the motor bank, were they not?

A. Let me take a look at this.

Q. Look at the potential review.

A. Uh-huh.

Q. Page 6.

"At the time he needs to be more responsive, needs more responsibility of his department, handling the problems of his people, himself," something?

A. Himself.

Q. "Insufficient checks," apparently?

A. "Lack of I.D.s and insufficient checks."

Q. All right.

"Tried to get him to take more responsibility of his people without my assistance and he's got a potential some.

And then there's some written comments and that was filed three months later by his resignation which was, I believe, was more or less requested, was it not?

A. I don't recall. I don't recall whether it was requested, no.

Q. Well—

A. It had not greatly improved and he was not doing real well.

Q. He was not going to stay there as a supervisor any longer, really, at his present level of performance, was he?

A. Well, it was, as I recall, it was not—you know, it was not the greatest job we have ever seen done. He was having some problems.

* * * *

REDIRECT EXAMINATION BY MR. McGEE

[II Tr. of Trial 243:]

* * * *

Q. Well, reviews or when someone was hired?

Basically on a day-to-day basis, did you have a hands-on connection with all of the decisions in the personnel area of the bank or did someone else make most of those decisions?

A. As far as—I was ultimately responsible for anything that went on, as far as personnel matters. But as far as actually interviewing the employees, I rarely did that. And I never did hire any of the employees that did not directly work for me. Those were handled by the supervisors themselves. But ultimately, as far as the outcome of what took place in the personnel area, I was responsible and held accountable for that.

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[TESTIMONY OF GARY WAYNE SHIPP AT CLASS CERTIFICATION HEARING, BY MR. BENDER, JUNE 24, 1982:]

[Tr. of Class Cert. Hrg. 140:]

• • • •

Q. Okay. In that connection, are you the person who is responsible for the hiring at the bank?

A. I'm in charge of the Personnel Department, yes.

Q. Okay. And I take it on personnel decisions, hiring, determination, et cetera, you obviously ask for input from others within the bank, but I take it you have the ultimate final say in those decisions, is that correct?

A. Yes, I discuss it with the supervisors when a decision is made by them.

• • • •

[Tr. of Class Cert. Hrg. 157:]

• • • •

Q. Would you have any reason to think, just in looking through these application logs of people who came through the door and left you an application, that there would be any more that would be—and we are going to assume some of them probably were not qualified for the jobs that they were applying for.

Would there be any more reason to think there were more blacks that were unqualified than whites that were unqualified?

A. I don't know how to answer the question. I don't know what to base my answer on.

Q. Do you have anything, anything that you know of that you would be aware of, that would make you think that there would be fewer blacks that would be qualified than whites that would be qualified, just in terms of people who come through your door and leave their applications?

A. No.

* * * *

[Tr. of Class Cert. Hrg. 194-95:]

* * * *

Q. Mr. Brown—Plaintiff's Exhibit 8—states in his application that his duties were—asked to describe your experience in a concise manner, et cetera.

Responsible for waiting on and ringing up customers, the nights—I don't know—I don't know if we can read that. I turn in a register. Other duties include restocking and watching for shoplifters. Responsibility is general merchandise control. Next to that is cashiers. I had to keep a close watch on cashiers. At the end of my shift—something else is missing there—to look for over/shortages. I have had five years cashiering experience.

Now, that sounds like that his vast amount of experience is basically a cashier-type person, was it not?

A. That's what that would indicate, but we had verified that he had the supervisory experience along with that.

* * * *

[TESTIMONY OF JOY CHANDLER AT CLASS CERTIFICATION HEARING, BY MR. BENDER, JUNE 24, 1982:]

[Tr. of Class Cert. Hrg. 281-82:]

* * * *

Q. When did you first come to work for the bank, Mrs. Chandler?

A. Five years ago June the 15th.

Q. Okay. And what job did you hire in at?

A. Customer service.

Q. Okay. And did you have any prior banking experience prior to that?

A. No, I did not.

Q. Okay. Had you had any related experience as a cashier or anything like that?

A. No.

Q. Okay. So, that was your first stab at the banking business, I take it?

A. That is right.

Y. Okay. And how long did you stay in the customer service area, then?

A. Two and a half years.

* * * *

[Tr. of Class Cert. Hrg. 282:]

* * * *

Q. Okay. And then at the end of that two and a half year period, is that when you were advanced to the bookkeeping supervisor?

A Yes.

Q. Okay. And whose place did you take there as bookkeeping supervisor?

A. Richard Burt.

* * * *

[TESTIMONY OF GARY WAYNE SHIPP AT DEPOSITION, MR. BRENDER, JUNE 8, 1982:]

[Tr. of Deposition of Gary Wayne Shipp 16-18:]

* * * *

Q. And under you is the Personnel Office; is that right?

A. That's right.

Q. It's staffed by Sandy Carson?

A. Right.

Q. Are you the person, though, that makes most of the personnel decisions as such?

A. Yes.

Q. Sandy Carson is more or less your secretary?

A. Secretary and assistant, yes.

Q. How is the hiring done? When somebody comes in to apply for a job, are they interviewed first by your office? How does that proceed?

A. The procedure would be to—if we have an opening, we'll take an application for whatever job they're applying for; and if there is an opening, I will sometimes interview; and if I'm not available, they will be interviewed by the supervisor of the department that does have the opening.

Q. After your interview, is there any other interview by any other bank personnel?

A. Again, it depends on whether there is an opening in an area.

Q. I take it you don't interview them unless there is an opening?

A. That's right.

Q. So if you have an opening, you interview them. Do you then send them down to somebody else to interview them?

A. Yes.

Q. Is that done only in cases that you determine that you want to hire them?

A. Well, that I would like for someone else to interview them, yes, if I think they're qualified for the job.

Q. If you don't particularly care for them, you don't send them down to the second interview?

A. Well, if they don't meet the qualifications or something of that nature.

Q. Well, what I'm getting at is, let's assume that you have two people that pass the typing test or whatever. Do you send on to the second interview just those that you're fairly impressed with, or do you send all of them along, so long as they possess the minimum qualifications?

A. I send them all.

Q. Is there any other interview after they go to the department head?

A. Their direct supervisor usually decides which one they think they would like to have, and we discuss it from there.

Q. You and the supervisor discuss it?

A. Uh huh.

Q. And then do you have the final say in that? I'm assuming you do.

A. Yes, I do.

* * * *

[Tr. of Deposition of Gary Wayne Shipp 25-26:]

* * * *

Q. When a job becomes open within the bank, do you have some kind of posting system for informing employees?

A. Yes.

Q. How is that done?

A. We place a notice on the bulletin boards at the main bank and the motor bank telling what position, what grade it is, and what they must do to apply for it, and what length of time we will accept applications, three days.

Q. How many days?

A. Three days.

Q. Three days?

A. Normally.

Q. How long have you been posting jobs in that way?

A. Since August of '79.

Q. August of '79?

A. Yes.

Q. A person who is already employed there, they already have an application on file, I take it. What do they do?

A. That's what we're talking about is the posting. They come and fill out a form that they apply for this position, this one that is posted. That's what I mean by application.

Q. Does the posting have on it the requirements in your job manual?

A. Normally, they do not have any requirements, only in certain cases for like a secretary where we know we need a minimum of so many words per minute typing. Usually only in those cases.

• • • •

[Tr. of Deposition of Gary Wayne Shipp 40-41:]

• • • •

Q. Who all applied for the motor bank supervisory position?

A. Clara Watson, Kevin Brown, Donna Love, Sylvia Harden, I believe. I believe that was all.

Q. Kevin Brown was selected, I believe; is that right?

A. Right.

Q. Did you and Mr. Burt also make that decision?

A. Yes, we did.

Q. Did Pat Cullar have any say-so in that decision?

A. No, she did not.

• • • •

[46-47:]

• • • •

Q. When you were considering experience, did you consider Clara Watson to have had experience in supervising other employees, also, within the bank?

A. No.

Q. Why not?

A. She hasn't. In my opinion a supervisor, functioning as a supervisor, makes salary reviews, hires individuals, terminates those individuals, and she had no training in that area, in my opinion.

Q. In terms of hiring people and firing them?

A. Making salary reviews. That sort of thing.

Q. Did she have supervisory experience in the other sense of directing employees in their day to day duties?

A. She was considered Richard Burt's assistant when he was away from his post.

Q. What did those duties require?

A. To okay checks that the tellers would have a question about; to confront customers that would have a problem of a general nature; acting upon the daily routine set out by the supervisor, who was Richard Burt; she would see that those got done; that sort of thing.

Q. How long did she function in this capacity?

A. I do not remember.

Q. But you didn't consider this supervisory experience such that she would be eligible for doing the supervision in the motor bank?

A. I did not consider that.

Q. She certainly had more banking experience than Kevin Brown, did she not?

A. That's true.

• • • •

[52-53:]

• • • •

Q. Who became Richard Burt's assistant after Clara Watson left? I guess it would really be Pat Cullar's assistant; is that right?

A. Yes, after Richard left, it would be Pat, yes.

Q. He was advanced; he didn't leave?

A. Gosh, I don't recall initially who it was.

Q. Who is now holding that?

A. Linda Brimer.

Q. Is that generally done on kind of a seniority basis? Is it the person that's been there the longest?

A. That's not really the basis, no.

Q. How is that person selected?

A. It's generally decided upon by that supervisor who is eligible to take on that responsibility.

Q. In other words, it is kind of a merit sort of thing. The person who you feel like is the best worker, or the smartest, or whatever, is going to get that over somebody who just has more years on the job?

A. The most capable person, yes.

• • • •

[59-60:]

• • • •

Q. Now, at thhe top of each of these applications, there is a marking that has a B/F, on Doris Hines, for instance.

A. Yes.

Q. Does that indicate a black female?

A. Yes, it does.

Q. And on Plaintiff's Exhibit No. 2, I believe, it's an M/B. Would that indicate a black male?

A. It should be black male, yes.

Q. And on Plaintiff's Exhibit No. 3, you have a W/F, which I take it is a white female; is that right?

A. Yes.

Q. And Plaintiff's No. 4 you have W/F which is a white female; is that right?

A. That's right.

Q. There is no place in the form itself for race or sex, is there?

A. I don't believe so. There shouldn't be, no.

Q. I think this form is a copyrighted form from Hilton Shepherd Company, personnel consultants here in Fort Worth; is that right?

A. Yes.

Q. Do they do some work for the bank, or do you just buy those forms?

A. We just buy those forms from them.

Q. Who makes this notation at the top of each of these employment applications?

A. The person in our personnel area that takes that application or receives it in hand.

Q. What is the purpose in designating these applicants by race and sex?

A. For one reason, to fill out the job applicant flow log. That's done, like I said, as early—daily, or as soon as we can during the week; and without that, it would be difficult to do that.

The other reason is so we'll know. We just file them.

• • • •

DIRECT EXAMINATION OF JAMES K. McKNIGHT BY MR. McGEE

[III Tr. of Trial 2-4:]

* * * *

JAMES K. McKNIGHT DIRECT EXAMINATION

BY MR. McGEE:

Q. Mr. McKnight, state your full name for the record, please?

A. James K. McKnight.

Q. How are you currently employed?

A. I am Executive Vice-President of Fort Worth Bank & Trust.

Q. How long have you served in that capacity?

A. Since March of 1982.

Q. Had you served in any previous capacity at Fort Worth Bank & Trust prior to that time?

A. No.

Q. And prior to coming to Fort Worth Bank & Trust, where had you been employed?

A. At First National Bank of Fort Worth.

Q. What capacity there?

A. As vice president and loan officer.

Q. As a part of your responsibilities as Executive Vice-President of Fort Worth Bank & Trust, do you serve on the Salary Review Committee?

A. Yes, I do.

Q. How many members are on that committee?

A. There are three.

Q. And is Gary Shipp one of those members?

A. Yes.

Q. And Helen Brister the other?

A. Yes.

Q. Tell the Court very briefly the function of the Salary Review Committee.

A. We are there to review the performance appraisals that are completed by the supervisor and to give them

guidance on, not only the reviews that they have done, but the salary recommendations that they might make.

Q. Who has the ultimate responsibility for preparing these evaluations and determining a number of points that a particular employee will receive?

A. Well, the supervisor prepares the appraisals, and the points are based upon the grades on each individual area.

Q. Does the committee award those points or does the supervisor?

A. No. The supervisor grades the employee on the appraisal, and then the points are just tallied up at the end.

Q. All right. How long have you served on the Salary Review Committee?

A. Since I came to the bank.

Q. So approximately two-and-a-half years?

A. Right.

Q. During that two-and-a-half-year period, have you seen any evidence that Gary Shipp exerts extreme or unusual influence in the decisions of the Salary Review Committee?

A. No.

Q. Is his participation any greater or less than any other member of the committee?

A. No.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 9-10:]

* * * *

Q. Then you look at the rating of the nonofficer salary review worksheet, and you look at the rating given by the supervisor, and you make a determination on whether or not that rating is an accurate rating; is that correct?

A. No. Those review sheets right there are handled by the supervisor. We don't pick them up and look at them.

Q. You don't look at the review sheets at all?

A. We are listening to the supervisor, and they are giving the review.

Q. Do they then give you what they find to be the final rating?

A. We tally the points and make sure that they are correct, based upon individual areas as to grade.

Q. So you do tally the points up and see what the final evaluation is; is that correct?

A. Yes.

Q. Okay. And then you look at what the percentage of increase that's going to be given by virtue of that evaluation and determine whether you feel like that is a correct percentage increase or not; is that correct?

A. Well, we've already determined that those are the percentages that we would like to have in the way of raises based upon those scores.

Q. I understand, but you look at the score—Okay. In other words, if you feel like the score is a score this employee really deserves, then you are going to approve that score, which automatically approves that percentage raise; is that correct?

A. Yeah. If everyone agrees basically on the review and, you know, it's already predetermined what the percentage would be.

* * * *

[III Tr. of Trial 14:]

* * * *

Q. Well, do you look at any of these review sheets? Do you look at how they are rating these people?

A. Normally I don't look at these review sheets.

Q. So the salary committee doesn't look at those review sheets, then?

A. We may have one member on the committee that wants to see the bottom sheets, for instance, but nor-

mally all these sheets are the same, and the supervisor is reading what they have already written, and there is no need for us to look at it.

Q. So, when the Salary Review Committee, then, is listing to the supervisor, they are either rubber stamping what the supervisor does or going off on their own tangent; is that right?

A. Well, we usually agree with what the supervisor has. If we don't agree and there's some discussion needs to be made, well, there is.

Q. Okay. You say you usually agree. How often would you disagree, as best you can estimate that by number of times or number of people or whatever?

A. It is hard to say because there are several different areas that we are reviewing on every employee.

[III Tr. of Trial 19:]

* * * *

Q. All right. Can you recall any instances when the supervisor's rating has been lowered by the Salary Review Committee?

A. Oh, on one particular area or on the overall score?

Q. Well, I guess it would be the same thing. If you lowered them on one area, that would lower the overall score, would it not?

A. There have been times when after discussion a supervisor will see that perhaps another rating is more appropriate.

Q. So what you do is you say, hey, look, I don't think this employee ought to be rated this highly, and then the supervisor says, yeah, I think you are right, and lowers the rating. Is that what you are saying?

A. No, no. Usually the supervisor will defend their original position.

* * * *

[TESTIMONY OF JAMES K. McKNIGHT AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 24-25:]

* * * *

Q. During the review—when the committee reviews the evaluations of various employees, during the time that you have been there, has there ever been any discussion concerning the race of an individual during that review meeting?

A. No, sir. As I mentioned before, a lot of times I don't even know what the race is when they come up there. We don't have a picture or anything attached to the review. It is just reviewed on the performance.

Q. Have you ever heard a person's race mentioned in connection with the review of any case you have set on?

A. If I don't know the person's name and they are trying to identify them to me it may come up that way.

Q. In any other way have you ever heard the race of an individual mentioned?

A. No.

Q. Or the sex of an individual mentioned?

A. No. We can usually tell from the name, of course, what the sex is.

* * * *

DIRECT EXAMINATION OF
RICHARD ALLEN BURT BY MR. McGEE

[III Tr. of Trial 26-27:]

* * * *

Q. Mr. Burt, state your full name for the record, please?

A. Richard Allen Burt.

Q. How are you currently employed?

A. I'm employed with Summit National Bank and with Summit Bancshares and also with Tarrant County Junior College.

Q. In what capacity are you employed by Summit Bank?

A. Summit National Bank, I am Vice President-Cashier.

Q. And at Summit Bancshares, what is your employment?

A. Vice-president in charge of operations.

Q. All right. Is Summit Bancshares the parent, in effect, of Summit National Bank?

A. Yes, it is.

Q. Is that a single bank holding company or multi-bank?

A. It is a multi-bank holding company.

Q. What other banks are a participant in that holding company?

A. Alta Mesa National Bank and Camp Bowie National Bank.

Q. You mentioned you are also employed by Tarrant County Junior College. In what capacity are you employed there?

A. Part-time instructor.

Q. What courses do you instruct?

A. Several different banking courses, management courses.

Q. Are these courses you teach at night school?

A. Yes, sir.

Q. All right. Prior to your employment in Summit National Bank and the others that you just named, where were you employed?

A. First City Bank of Lancaster.

Q. And what was your position at that point?

A. Vice President-Cashier.

Q. All right. And prior to the bank in Lancaster, where were you employed?

A. Fort Worth Bank & Trust.

* * * *

[III Tr. of Trial 31:]

* * * *

Q. All right. When you left your responsibilities as teller supervisor, of course there had to be someone selected to take your place. Was the selection of that replacement under your supervision or under your direction?

A. Yes, sir, it was.

Q. All right. And who made the decision as to who the replacement would be?

A. I did.

Q. All right. Did you have occasion to interview the various applicants for that position?

A. Yes, sir, I did.

Q. All right. Was Clara Watson one of those applicants?

A. Yes, sir, she was

Q. There were other applicants, I assume?

A. Yes, sir. There was probably six or seven total.

Q. Who was ultimately selected?

A. For the lobby teller supervisor position, Pat Cullar.

* * * *

[III Tr. of Trial 32-35:]

* * * *

Q. All right. And did you have to get Gary Shipp's agreement on that selection?

A. Well, formally, yes, I did. The way that works is I was the one in charge of the responsibility of interviewing each of the applicants, doing all the investigative type work of talking to maybe previous employers or previous jobs that they had been on. I was the one that interviewed the people that had applied for the job, and I was the one that made the decision.

And, you know, since Mr. Shipp was my supervisor, I had to tell him, this is the decision that I have made and, you know, more or less give him the opportunity to change it or to okay it. And he never changed any decision that I made.

Q. All right. In making the selection of Pat Cullar as the lobby supervisor and choosing her above the others who made application, including Clara Watson, tell the Court how you evaluated those applicants and arrived at your decision that Pat Cullar was your choice?

A. Well, there's a lot of things that go into being a supervisor, and, you know, there's experience, leadership ability, you know, experience in supervising others previously, ability to get along with others and numerous things. And what I did was just call each of the applicants in, spend a brief time with them, talked about their experience before and, you know, what they had previously done. And from that chose what I believed to be the best applicant.

Q. You had had an opportunity to work with Ms. Watson more or less perhaps closer than the other tellers who were under your supervision because of her additional assistance to you.

Did you form an opinion as to whether or not she was suitable at that time to be a supervisor?

A. Yes, sir, I did.

Q. What was your opinion?

A. At that point, we had some resentment from other tellers under her leadership. There were times when, like I said, she was the one to go to when they needed a check okayed or something. You know, minor help like that when I was not available. And the other tellers would not go to Ms. Watson to get a check okayed. They would either call the drive-in supervisor or maybe bookkeeping supervisor or find help in some other manner.

Q. Who was the drive-in supervisor at that time?

A. Pat Cullar was.

Q. And she was the one that you ultimately selected as the teller supervisor or lobby supervisor?

A. Yes, sir.

Q. In your decision to choose Pat Cullar—or state it another way, in your decision that Clara Watson was

not the right selection, was Clara's race given any consideration?

A. No, sir, it was not.

Q. With regard to your experience at Fort Worth Bank & Trust in supervisory positions, were you given the authority to hire your employees, the employees that worked underneath you?

A. Yes, I was.

Q. Did Gary Shipp make the ultimate decision who was hired or did the supervisor?

A. Well, there again, I was the one that made the decision, and I would always say I am going to hire this person, or this is who I recommend. And he never did overrule any decision that I made.

Q. All right. During the time that you were employed by Fort Worth Bank & Trust, did you observe any evidence that there was a plan or policy or routine by the bank to pay black employees less in comparison to nonblack employees?

A. No, sir.

Q. All right. Was the race of those employees ever a consideration as to how they were paid?

A. No, sir, it was not.

Q. Likewise, was race ever a factor in the decision to promote or not promote any particular employee?

A. No, sir, it was not.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[III Tr. at Trial 36-37:]

* * * *

Q. Okay. And prior to going to work for the bank—we don't have anything in your employment record that says whether you had any previous experience in that, you know, prior to that '76 date. I am having a hard time. Your date of birth is in 55. So you were about 21 years old at that time, and you had graduated from high

school, looks like, in '74, according to page 2 of the record.

Had you been working somewhere else prior to going to work for the bank?

A. Yes, sir.

Q. Where had you been working?

A. Just various odd jobs. I had worked at Polytechnic Baptist church for a couple years, worked at Ashburn's ice cream for six or eight months, and I had worked at a drivein grocery store. You know, enough money to get me through school.

Q. Jobs you got out of high school and while you were going to college?

A. That is correct.

Q. Were you going to college full-time during those two years?

A. Yes, sir, I was.

Q. These were part-time jobs you had scooping ice cream or cleaning up the church or something of that sort?

A. That is correct.

* * * *

[III Tr. of Trial 44-45:]

* * * *

Q. But you did—and you testified here recently just a minute ago that you promoted—or you were the one that decided that Pat Cullar would get your former job; is that correct?

A. That is correct.

Q. All right. Now, I want to ask you if that was made solely on the basis of the supervisory experience of she and the other applicants?

A. No, sir, it was not.

Q. What were the other considerations?

A. Well, like I detailed a minute ago, there's always a number of things that go into any kind of promotion or trying to be a supervisor.

Q. All right. Were those the things that you named? I'll list them. It might go faster if I read them, and if you have got anything else you let me know.

But you mentioned experience, leadership, previous supervisory experience and ability to get along with others?

A. Those are the ones that come to my mind. But in any decision like that, there's maybe fifty or a hundred things that really enter into it.

• • • •

[III Tr. of Trial 47:]

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Q. All right. Was it the practice of the bank at that time to have a formal list and to make formal ratings and then to come out with a list of—you a status list or a list of who was on top rated down to the bottom? Were there any of those formal procedures at the bank at that time?

A. Not that I remember.

Q. All right. Now, you say that you interviewed each of these people personally. You brought them in, and you interviewed them. Is that correct?

A. Right.

Q. Excuse me?

A. Just a short, maybe 10, 15 minutes. You have applied for the job, and this is what we are looking for and that type of thing.

• • • •

[III Tr. of Trial 61:]

• • • •

Q. Where did you rate Clara Watson of the five applicants that you had? Obviously Pat Cullar was first because that is the one that you chose.

A. I only rated No. 1. I only chose the best applicant. I did not go through and rate one to five others.

Q. When you had these interviews, did Gary Shipp participate in the interviews in any way?

A. No, he did not.

• • • •

[III Tr. of Trial 65:]

• • • •

Q. All right. In other words, you never could see any difference based on race, now, just one race in the way the blacks and whites were performing at the bank from those that you observed?

A. In groups, no.

• • • •

[III Tr. of Trial 68:]

Q. All right. Now, did you participate in the decision to make Kevin Brown the motor bank supervisor?

A. Yes, I did.

Q. All right. And did you talk to Gary Shipp about that decision?

A. After I made it, I informed him of the decision.

Q. Once again, you made the decision, and you went to Gary and said here is what I decided to do; is that right?

A. That is correct.

Q. Yeah. Now, did you follow the same procedure that you did in the motor bank supervisor's position?

A. Yes, sir, I did.

• • • •

[III Tr. of Trial 71-72:]

• • • •

Q. You were responsible for the advancement of Kevin Brown to motor bank supervisor, as I understand it; is that correct?

A. Yes, sir, that is correct.

Q. And, as I understand the situation, he had no previous supervisory experience at the bank, and there's

some question about what his prior experience was over that.

Do you recall what that experience—he was never a supervisor of the bank prior to becoming the motor bank supervisor; is that correct?

A. That is correct, he was not a supervisor at the bank.

Q. And then with regard to his previous experience, what previous experience did he have?

A. As I remember, he worked at Six Flags over Texas.

Q. Do you know what he did there?

A. He was a supervisor over a department or a section or something like that, had about, as I recall, 30 to 40 people working for him.

Q. Did you have any information about that, other than what he put on his employment application?

A. I spoke with his previous supervisor.

Q. Who was that?

A. I don't remember the name.

Q. How do you—are you doing this by memory, or did you have some note of this?

A. I just remember—that was a process that I went through to verify his supervision.

Q. You did that at the time he was applying for this supervisory job?

A. Yes, I did.

• • • •

[III Tr. of Trial 75-76:]

• • • •

Q. Let me interrupt you for a second.

I don't want to know all the things that go into being a supervisor. I want to know what went into this decision at this time for you to deny Clara Watson the job and give to it Kevin Brown.

A. Okay.

Q. Those considerations. I don't want to know all the other considerations. I want to know all those considerations and what differences there were.

A. Okay. The ability to get along with others. Clara had had numerous problems with one lady named Lena Gray. Lena finally quit over the situation. She had problems with Edna, problems with Linda Schell, had had problems—didn't have the respect for the people. They would—they were reluctant to go to her and get checks okayed. They would go find another supervisor in the bank to answer the questions. Clara did not have the respect nor the leadership ability that Kevin had. Kevin had prior supervision experience from Six Flags Over Texas, which he had worked with approximately 30 people. I don't remember the exact amount. And he was a good teller, knew the people in the drive-in very well, and they had the respect for him. He had worked as sort of the lead person in the afternoon shift when he was there.

• • • •

REDIRECT BY MR. McGEE

[III Tr. of Trial 86-88:]

• • • •

Q. Could you tell the Court the factors that lead to your decision to promote Mrs. Cullar to the lobby supervisor position as opposed to Clara Watson?

A. Well, I think she had been with the bank for a number of years; had strong experience before she came to the bank. The main thing, she had worked as the assistant to Brian England when he was there, and worked in the lobby.

Q. All right. She was also supervisor of the motor bank tellers at the time?

A. She had moved to the motor bank and she had that experience also, and knew the people very well.

Q. In viewing the evaluation of her work as a supervisor, I suppose it would be somewhat correct to say that,

as Mr. Brender's characterized, you weren't very high on the hog on her.

A. Right.

Q. I don't know if that is really accurate, but at any rate you didn't give her high, glowing marks?

A. That is correct.

Q. All right. Given that, were you still satisfied or dissatisfied with her performance as a supervisor?

A. I think I was still satisfied.

Q. All right. Were you satisfied enough to think that she could handle the responsibilities of the inside teller supervision?

A. Yes, sir.

Q. And had you had an opportunity to observe Clara Watson's work as your assistant while you were the lobby supervisor or teller supervisor.

A. Yes, sir.

Q. All right. Were you satisfied that Clara Watson would be able to handle the responsibility as supervisor of the lobby tellers?

A. No, sir, I was not.

Q. You were satisfied that she was not able to do that or did not have the skills to do that?

A. Yes, sir.

MR. McGEE: All right. Pass the witness.

RECROSS EXAMINATION

BY MR. BRENDER:

Q. These considerations that you just told Mr. McGee applied to Pat Cullar, a number of years with the bank, that certainly applied to Clara Watson, assistant to Brian England. She was your assistant, and the only thing you have got in there was she had some supervisory experience in the motor bank, was the experience that you were responsible for her getting. Isn't that correct? Why don't those same considerations apply to

Clara Watson that you keep applying to these other people?

A. They were. Those were just a few of the factors.

* * * *

[TESTIMONY OF RICHARD ALLEN BURT AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 90-92:]

* * * *

Q. Now, did—now, you've made reference several times about the ability of the plaintiff, Watson in this case, to get along with coworkers and so forth?

A. Yes, sir.

Q. When—over what period of time did this occur?

A. I don't remember exactly when I had the complaints and all, but the main time that I was evaluating her would have been the year while I was, that I was the teller supervisor.

Q. Of course, I note in the evaluation that is referred to.

A. Yes, sir.

Q. Were your—from whom did you receive complaints?

A. Well, I received them from other tellers, such as Edna and Linda Schell and then I got complaints, like from the people that these tellers were going to, like Joy Chandler who was a supervisor in another area and fom Pat Cullar who was the supervisor in the drive-in, saying to me the tellers aren't going to Clara; they're calling me to get a decision instead of going to the one that they really should supposed to go to.

Q. Did you rely—First, did you ever talk to Clara about those complaints?

A. We discussed them when we went over the review, because it was a point—we had discussed those reviews with the employees.

Q. All right. Did you rely on those complaints in your actions in any of the matters that's before the Court?

A. I think that is a factor. I wouldn't say that was the determining factor, but it is—you know, there is a lot of things that go into making a decision and that would be one of them.

Q. Well, my question is: Did you place some reliance on these complaints?

A. Yes, sir, I did.

Q. And what were the complaints? I mean, just what did they say? In other words—and I am admitting it not for the truth of whether Clara did it or not, but the fact that you relied on what you were told about co-employees, what did the co-employees tell you?

A. Well, the complaints that I received were: when I asked her a question, she doesn't answer it properly or the answer that she gives me I can't rely on because it doesn't sound right; or possibly she won't answer them and tell them I'll get to that later; I'll get to that later and never gets back to them, or the type of not being comfortable in going to her and asking for a decision and receiving a good decision, were the complaints that I got.

* * * *

DIRECT EXAMINATION OF SYLVIA LAVONNE HARDEN BY MR. McGEE

[III Tr. of Trial 93:]

* * * *

Q. Sylvia, state your full name for the purpose of the record, please?

A. My name is Sylvia Lavonne Harden.

* * * *

[III Tr. of Trial 94:]

* * * *

Q. Mrs. Harden, how are you employed?

A. How long?

Q. How are you employed? What is your—

A. Oh, my position is assistant supervisor of the drive-in.

Q. All right. How long have you served in that capacity?

A. Uh, almost a year now, assistant supervisor.

Q. That is at Fort Worth Bank & Trust?

A. Right.

Q. Okay. Prior to serving as assistant supervisor in the drive-in or the motor bank, where were you employed in the bank?

A. Okay. I was commecial teller in the main bank, and I worked in the collection department in the main bank.

* * * *

[III Tr. of Trial 95:]

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Q. I see. When did you first come to work at Fort Worth Bank & Trust?

A. May of 78, I believe.

Q. All right. Was the bank in the current location?

A. Yes, it is.

Q. How did you learn of the opening at the bank?

A. Texas Employment Office.

[III Tr. of Trial 97-99:]

* * * *

Q. Okay. Since your employment by the bank, have you had occasion to request transfers to other positions?

A. Yes.

Q. Has the bank given consideration to your requests for transfer?

A. Yes.

Q. In fact, as I understand it, you have received a transfer?

A. Right, I have.

Q. What—from what job to what job?

A. From commercial teller to what I am now, assistant supervisor.

Q. All right. Did—you have made application previously for other promotions, have you not?

A. Yes.

Q. All right. Do you feel like you were given fair consideration for those positions?

A. I feel I was, yes.

Q. All right.

During the period of time that you have been working as approximately six years at the bank, do you feel that Fort Worth Bank & Trust has treated you fairly with regard to all of the conditions of your employment?

A. Yes.

Q. Including salary and promotion, transfer, any other area, or maybe I can phrase of it differently. Is there any area where you feel like you are treated unfairly?

A. No.

Q. The allegations—some of the allegations in this case, Ms. Harden, are that Fort Worth Bank & Trust engages in a policy or a series of practices of discrimination on the basis of race against all black employees.

Do you have an opinion whether that is true or not?

A. Not for me it is not.

Q. All right. Likewise, a similar allegation has been made about Gary Shipp, that he's the one who is responsible for the discrimination that is supposedly taking place at the bank.

Do you have an opinion as to whether that is true or not?

A. No, Gary always speaks to me. I mean, I can't say that he has discriminated against me. I cannot speak for myself.

Q. As far as you are concerned, he is not?

A. No.

Q. All right. Have you ever been given any greater workload or have any of the black employees that you

have seen been given greater work loads than similarly situated white employees?

A. Say that again.

Q. So far as you are aware, Ms. Harden, have black employees been assigned greater workloads than white employees?

A. No, not to my knowledge.

• • • •

CROSS EXAMINATION BY MR. BRENDER

[III T. of Trial 102:]

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Q. All right. Now, of course, for the record I'm not sure—I think we have discussed it but you are black; is that correct?

A. Yes, I am.

• • • •

[III Tr. of Trial 124-25:]

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Q. Do you fill out employee evaluations?

A. We work at it together. We both have our opinions and put them together and they come out as one.

Q. Pardon me. I didn't understand?

A. We both have our own opinions. She has hers and I have mine, and we put them together and we put them down.

Q. All right. How many of those have you done since you have been in that position?

A. We have three-months, and a six-months and yearly. I have done two yearly, two six-months and two three-months.

Q. All right. Do those all go before the Salary Review Committee?

A. The yearly ones go before the Salary Review but the six-months and the three-months don't.

Q. They do not?

A. No.

Q. Those are not salary-related evaluations; is that right?

A. Well, I mean the three-month one is. It goes before Helen.

Q. Before who?

A. Helen Brister.

Q. I see. Who is Helen Brister?

A. She's the director over the tellers.

Q. All right. And—all right. And have you ever appeared before the Salary Review Committee?

A. Sure.

Q. How many times?

A. Three times that I can think of.

Q. And was that with Linda Colwell?

A. Okay. One was with Linda and one without Linda.

• • • •

[TESTIMONY OF SYLVIA LAVONNE HARDEN AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 130-31:]

Q. Did you ever hear any complaints from other blacks that worked there, other than Clara?

A. What kind of complaints are you talking about?

Q. About their treatment or about not getting promoted or about salaries, or about anything with the way the bank was treating them or not treating them, or any differences being made between blacks and whites or anything of that nature?

A. No, I can't recall of any, no.

Q. Is Clara the only person that you have ever heard make a complaint——

A. Right.

Q. —about her treatment or about—from lack of promotions or things of that kind among the blacks?

A. Right, yes.

Q. Have you ever heard whites make any complaints about not getting promoted or the way they were treated?

A. Yes.

Q. What—who—how many whites? Do you recall?

A. Let me think. Someone put in for the same job I did, collection, one year. I can't recall who it was.

Q. Did you get the job?

A. I thought she should have got it.

Q. Did you get the job?

A. Yes, I got the job. They thought they should have got it.

Q. But it was a white complaining because you got the job?

A. Yes.

• • • •

DIRECT EXAMINATION OF PAULA HILL BY MR. McGEE

[III Tr. of Trial 140:]

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Q. State your full name for the record, please?

A. Paula Hill.

• • • •

[III Tr. of Trial 140-41:]

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Q. Mrs. Hill, just for purposes of the record, you are a black; are you not?

A. Yes, I am.

Q. All right. And where are you currently employed?

A. At Fort Worth Bank & Trust.

Q. All right. And what position do you hold at the bank?

A. New accounts clerk.

Q. All right. And how long have you been a new accounts clerk?

A. I have been there about three-and-a-half years.

Q. Okay. When you first came to work at Fort Worth Bank & Trust, did you start out as a new accounts clerk?

A. No, I did not.

Q. What was the first position you held?

A. I started out in bookkeeping.

Q. All right. What year did you become employed at Forth Worth Bank & Trust?

A. I started to work in 1981, I believe.

* * * *

[III Tr. of Trial 142:]

* * * *

Q. How did you learn about the job opening at Fort Worth Bank & Trust?

A. Well, actually, I just happened to pass by there one day and I thought I would stop and go in and apply for a job.

* * * *

[III Tr. of Trial 147-49:]

* * * *

Q. Mrs. Hill, do you feel speaking for yourself personally that you have been treated fairly in all areas of your employment at Forth Worth Bank & Trust?

A. Yes, I do.

Q. All right. The allegations or the primary premise of this case is that there's a pattern or a practice by the bank of discriminating against its black employees.

Are you ware of such a pattern of discrimination by the bank?

A. Well, I don't feel personally that I have been discriminated.

Q. Do you feel—do you feel that other blacks have been discriminated against?

A. No.

Q. All right. On the same direction, the allegations are that Gary Shipp is the one who has engaged in this policy of discrimination.

Has Mr. Shipp engaged in any racial discrimination against you that you are aware of?

A. No, not against me.

Q. Are you aware of him making any kind of discriminatory actions as to other black employees?

A. No, I am not.

Q. So far as you have been able to observe, there is—have all of the employees in the bank, black, white, brown or otherwise, have they all been treated essentially the same, so far as the way that the bank enforces its policy on the employees?

A. Yes.

Q. In the customer new accounts area—rather—Excuse me. How do you determine the workload? How is it assigned?

A. I feel that it's been distributed evenly among the employees there in the department.

Q. And that would be true, black or white employees?

A. Right.

• • • •

[TESTIMONY OF PAULA HILL AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 168:]

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Q. Have you heard any discussion among whites and blacks that whites get more or blacks get more or blacks get less just because one is white and one is black?

A. No, I haven't.

Q. Have you heard any complaints among—I mean, the blacks as a group that they have, have you heard any complaints that they have to do more work in a particular job than a white doing the same job has to do?

A. No, I feel like the workload is, you know, evenly spread out among everyone.

• • • •

DIRECT EXAMINATION OF JACQUELINE DANCER BY MR. McGEE

[III Tr. of Trial 170:]

• • • •

Q. State your full name for the record, please.
A. Jacqueline Dancer.
Q. Ms. Dancer, for purposes of the record, you are black, are you not?
A. Yes, I am.
Q. How are you currently employed, Ms. Dancer?
A. Currently?
Q. Uh-huh.
A. Teller.
Q. Where are you employed?
A. Fort Worth Bank & Trust.
Q. In what capacity at the bank?
A. Capacity? Teller.
Q. Are you a teller there at the bank?
A. Yes, I am.

• • • •

[III Tr. of Trial 171:]

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Q. Ms. Dancer, how long have you been employed at Forth Worth Bank & Trust?
A. It'll be five years the 22nd of July.

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[III Tr. of Trial 172:]

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Q. Now, Ms. Dancer, how did you happen to make application at Forth Worth Bank & Trust?
A. How did I? Well, I saw the job o[illegible]ning in the paper.
Q. There was an advertisement in the classified ads?
A. Yeah.

Q. What position was open?
A. Paying and receiving teller.

• • • •

[III Tr. of Trial 174-75:]

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Q. While you were there in the motor bank, was there any segregation of black employees from white employees that you observed?
A. No.
Q. Were you personally treated any differently than any other teller in the motor bank area?
A. No.
Q. Did you observe any other black tellers being treated differently than white tellers?
A. Any differently?
Q. Yes, ma'am.
A. No.

• • • •

[III Tr. of Trial 178:]

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Q. All right. I take it then that you have been treated fairly, as far as you are concerned, by the bank?
A. As far as I am concerned, yes.
Q. All right. Are you aware of any situations where black employees have not been treated fairly by the bank?
A. Not that I am aware of.
Q. All right. Are you aware of any circumstances where Gary Shipp has treated any black employees unfairly?
A. Not that I am aware of.
Q. Have your dealings with Mr. Shipp and your contact with him, has he always treated you fairly?
A. Yes, very fairly.
Q. Ms. Dancer, have you noticed any indication that black employees, tellers, for instance, are given a heavier workload than white tellers are?
A. No. I haven't ever really noticed, no.

Q. So far as you have noticed, are tellers of all races given substantially the same workload?

A. Yes. If one has too much, we help each other. It is not like, you know, one teller has so much to do and she has to do it all on her own. We all help each other. It comes out fine.

• • • •

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 192:]

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Q. Okay, Well, have other people, whether you were aware of it or not, have they complained to you about discriminatory treatment at the bank? Other blacks, now, I am talking about.

A. No.

• • • •

DIRECT EXAMINATION OF PATRICIA CULLAR BY MR. McGEE

[III Tr. of Trial 200-01:]

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Q. State your full name for the record, please?

A. My name is Pat Cullar.

Q. Ms. Cullar, where do you work at this time?

A. At Fort Worth Bank & Trust.

Q. All right. And what is your title at the bank?

A. I'm assistant cashier.

Q. All right. Is that an officer position at the bank?

A. Yes, sir.

• • • •

[III Tr. of Trial 205-07:]

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Q. All right. And did you have occasion to serve as an unofficial assistant for Mr. England while you were a commercial teller?

A. Yes.

Q. Briefly what were your duties as his unofficial assistant?

A. I'd help the tellers if they had a problem, make sure the vault was closed if he was not there.

Q. You are aware, are you not, Ms. Cullar, that Clara Watson served in a similar capacity for Richard Burt?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. Okay. How did you become aware that there was going to be an opening in the motor bank supervisor position?

A. It was posted on the bulletin board.

Q. Okay. Mr. England left the bank, I think, did he not, in about 1980?

A. Yes, sir.

Q. All right. And his position came up.

Did you make application for it?

A. Yes, sir.

Q. All right. Did you receive that job?

A. No, sir.

Q. All right. Are you aware of who else may have applied for that job?

A. No, sir.

Q. All right. But Richard Burt was the person selected, was he not?

A. Yes, sir.

* * * *

[III Tr. of Trial 208-09:]

* * * *

Q. All right. I think going forward in another year in time, the—in'81, the lobby supervisor position became open when Richard Burt received a promotion to another level. Is that true?

A. Yes.

Q. And did you make application for the lobby position?

A. Yes, sir.

Q. All right. And was that an officer position at that time?

A. No, sir.

Q. All right. And do you know who the other applicants were for that lobby position?

A. No, sir.

Q. All right. But you were selected as the lobby teller?

A. Yes, sir.

Q. Or lobby teller supervisor?

A. Yes, sir.

Q. And you had served approximately a year as supervisor in the motor bank; is that correct?

A. Yes.

Q. Because of your selection as the lobby supervisor, that left a vacancy in the motor bank.

Was that job posted as being open?

A. Yes.

Q. Do you made application for that particular job?

A. I know a few that was—that did. I don't remember all.

Q. Did you participate in the selection process for that supervisor?

A. Richard and I discussed it.

Q. All right. Mr. Burt, you are talking about?

A. Mr. Burt, yes.

Q. All right. Did he ask for your recommendations as to who the best person was for the job?

A. I gave him my recommendation of who I thought.

Q. All right. And who did you recommend?

A. Kevin Brown.

Q. All right. Had you had—had you worked with Mr. Brown?

A. Yes, sir.

Q. And in what capacity?

A. I was his supervisor.

Q. All right. And that was in the motor bank?

A. Yes, sir.

Q. All right. Had he assisted you as—in a similar capacity, and you assisted Brian England?

A. Yes.

Q. About how long had he assisted you?

A. Approximately six months.

• • • •

[III Tr. of Trial 210-11:]

• • • •

Q. Ms. Cullar, did you—did you consider Mr. Brown's qualifications in making that recommendation to Mr. Burt?

A. Yes, sir.

Q. All right. Had you had an opportunity to observe him working with other people?

A. Yes, sir.

Q. All right. Were his skills as a motor bank teller of an acceptable level?

A. Yes, sir.

Q. Were they good, average, or how would you typify them, if you can?

A. Very good.

Q. All right. Did he demonstrate any ability to manage or supervise people?

A. Yes, sir.

Q. Did he have occasion to manage people, people in the motor bank while he was serving as your assistant?

A. Yes, he would close the drive-in for me.

• • • •

[III Tr. of Trial 211-14:]

• • • •

Q. Tell the Court what that means. The judge may not know what that means.

A. Okay. In the afternoons when I would leave, I would leave him in charge of the drive-in to help the—to assist the tellers with a problem with a customer, to get them money out of the vault and close the drive-in.

Q. What time is the motor bank opened up or was it then?

A. 8:00 o'clock in the morning.

Q. At what time did it close?

A. 6:00 o'clock.

Q. All right. Then, as I understand it, there are substantially two shifts that work in the motor bank; is that correct?

A. Yes, sir, at that time.

Q. All right. And did you work the first shift? I don't know whether you call it a shift or not.

A. It wasn't a shift. I worked until about—I would start at 8:00 or 8:15 and I'd leave about 4:00, 4:30.

Q. Okay. And during the period of time you were out of the motor bank, then you left Mr. Brown in charge?

A. Yes, sir.

Q. All right. Had—you have already testified that you have worked for a period of time with Clara Watson as a commercial teller.

So had you had an opportunity while working with her to observe her skills as a teller.

A. Yes, sir.

Q. All right. Did you have an opinion as to whether they were good, bad, acceptable or otherwise?

A. She was a good teller.

Q. All right. Had you also had an opportunity to observe how she dealt with her coworkers?

A. No, sir.

Q. Okay. Did you have any other opportunity to observe any other of her skills or qualifications?

A. No, sir.

Q. All right. You were familiar with her abilities as a teller?

A. Yes, sir.

Q. All right. Did you—do you recall who any of the other applicants may have been, other than Mr. Brown and Ms. Cullar—or Ms. Watson?

A. No, sir.

Q. All right. Do you recall whether or not you in your consideration, if you considered anyone other than Ms. Watson or Mr. Brown?

A. Repeat the question. I am sorry.

Q. Well, in your consideration of the person to recommend to Mr. Burt, did you—do you recall if you gave consideration to anyone other than Mr. Brown and Ms. Watson?

A. No.

Q. Okay. So you know you did not or, no, you don't recall?

A. I don't recall discussing anyone else but the two.

Q. All right. And it was your recommendation to Mr. Burt that Mr. Brown be selected; is that correct?

A. Yes.

• • • •

[III Tr. of Trial 214-18:]

• • • •

Q. During that two-year period that you were a supervisor, immediate supervisor over the tellers, did you have opportunity to hire any tellers to work for you?

A. Yes.

Q. Approximately how many people would you have hired, if you can estimate?

A. I have no idea how many.

Q. Was it one or two or was it more than that?

A. Well, a lot more than that.

Q. All right. Was it normal—were the normal circumstances for you to hire your own tellers or for someone else to interview them and hire them for you?

A. No, I interviewed them and hired them.

Q. Did you have any circumstances where anyone other than yourself hired tellers that worked under you?

A. No, sir.

Q. All right. In evaluating your employees, we've had testimony about how the evaluations are prepared and so forth.

You received those prior to the evaluation of a particular employee; is that correct?

A. Right.

Q. And did you consult with a personnel officer of the bank or Mr. Shipp or anyone to determine how you should fill out that evaluation?

A. No, sir.

Q. How do you normally fill those out? Do you take them home with you or do you sit in your office at the bank, or what do you normally do?

A. Normally in my office.

Q. All right. And, as I understand these evaluations, there are several segments to them, are there not Ms. Cullar?

A. Yes.

Q. Do you attempt to evaluate each employee on the basis of each individual characteristic or do you try to say, all right, this employee is worth X number of points and I am going to give them those points and work backwards.

In other words, I want you to tell the Court how you evaluate employees.

A. Okay. I take each question. We give examples of each question. I grade them on points, and my examples tell why I give them that point for the question, the individual teller.

Q. And prior to filling out this evaluation sheet, have you determined in advance how many points an employee is going to get, the total number of points before you fill out the—

A. The form?

Q. Yes, ma'am.

A. No, sir.

Q. All right. After you complete each question on the form, do you then total up the number of points that you have awarded and come to a total figure?

A. Yes, sir.

Q. All right. What is next down with that evaluation?

A. I go before a salary board and discuss each question and I tell them what points I give, give them my examples, and then I tell them how much the points add up, what a percent raise is and what I recommend for the raise.

Q. How many people serve on this committee?

A. Three.

Q. All right. Does the committee routinely take issue with your recommendations and change it in some fashion?

A. Sometimes we have.

Q. All right. Is that the normal practice or not?

A. No.

Q. Would it be fair to say, then, that normally your recommendation as to the particular increase is what is approved by the committee?

A. Yes, sir.

Q. In considering these evaluations, does the committee discuss the rates of the employee and does that enter into the discussion or consideration of the raise to be given?

A. No, sir.

Q. In personnel matters, do you routinely discuss them with Gary Shipp to get his approval on decisions involving your employees, black or white?

A. No, sir.

Q. Who would you go to, if you had a personnel problem?

A. I would go to Helen Brister mainly.

Q. What is Ms. Brister's title?

A. She's vice-president over operations.

Q. And is she in charge of personnel?

A. Yes.

Q. Ms. Cullar, have you received any policy on the part of Mr. Shipp or on the bank to treat its black employees any less favorably than any other employee?

A. Do I? Would I? Repeat it; I am sorry.

Q. Are you aware of any policy on the part of Mr. Shipp or Mr.—or the Fort Worth Bank & Trust to treat black employees any differently than it treats any other employees?

A. No, sir.

• • • •

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 219-20:]

• • • •

Q. Okay. Now, when you went to work for the Fort Worth Bank & Trust, did you start in the—in the motor bank?

A. No, sir.

Q. You started in the lobby?

A. Yes, sir.

Q. Okay. And then were you—when did you go out to the motor bank? Were you in the motor bank prior to becoming the supervisor of the motor bank?

A. No, sir.

Q. So you had not been out and worked in the motor bank at all prior to becoming supervisor of the motor bank; is that correct?

A. I worked Saturdays and Fridays but that's all.

• • • •

[III Tr. of Trial 226-27:]

• • • •

Q. Okay. Did you ever work in the motor bank when Clara Watson worked in the motor bank?

A. I could have on Saturdays but that's—

Q. But not regularly?

A. No.

Q. Okay. So, as far as whether she had ever assisted, for instance, in the position that you mentioned, that Mr. Brown had assisted you in the motor bank, you would not be aware of that, I take it?

A. No, I would not.

• • • •

[III Tr. of Trial 232-33:]

* * * *

Q. All right. And did you have occasion to review anybody else's credentials or review their capabilities or anything else, or did you just make a recommendation to Richard Burt?

A. I just made a recommendation.

Q. You didn't take into consideration anybody else; you just said I recommend Kevin because he worked good for me out here or something of that sort. Am I correct?

A. Okay. What—

Q. Let me repeat it.

A. Okay.

Q. In other words, as I understand it, what you did is you didn't evaluate people for that position; you just recommended to Richard that Kevin Brown be the one to have the job. Is that right?

A. Yes, sir.

Q. Okay. Now, you didn't interview anybody else—Did you even interview Kevin Brown?

A. No, sir.

Q. Okay. You just suggested him for the job, really. Would that be—

A. Or recommended him.

* * * *

[III Tr. of Trial 235-36:]

* * * *

Q. Okay. Did he ever discuss with you or tell you about whether or not he had ever supervised any employees at Six Flags?

A. Yes, sir.

Q. What did he say about that experience?

A. He was a supervisor when he quit.

Q. Are you using that form that I pointed out to you right there to refresh your recollection?

A. No, sir no, sir.

Q. He was a supervisor where?

A. At Six Flags Over Texas.

Q. Who did he supervise?

A. I do not know who he supervised.

Q. Do you know the nature of his supervision work or anything?

A. No, sir.

Q. You do know they basically hire a lot of young people to work out at Six Flags every summer, do you not?

A. Yes, sir.

* * * *

[TESTIMONY OF PATRICIA CULLAR AT TRIAL, UPON QUESTIONING BY THE COURT:]

[III Tr. of Trial 253-54:]

* * * *

Q. All rght. Now, did you get any instructions from anyone in the bank about hiring people when you took over as supervisor with the right hire in the motor bank? Were you given any instructions by anyone connected with the bank as to who to hire or not to hire or—

A. No, sir.

Q. —or any matters whatsoever?

A. No, sir. I make my own decisions.

Q. Were you given any instructions as to you hire so many whites, so many males, so many females, so many blacks, so many Hispanics or anything of this kind?

A. No, sir.

Q. Were you ever told by anyone in the bank to hire blacks or not to hire blacks?

A. No, sir. I just made my decision on my applicants.

Q. On your applicants?

A. Yes, sir.

Q. And were any of the recommendations that you ever made—well, did the hiring—did the final say-so, did it have to have anyone else's final say-so before that person went to work that you hired as a teller?

A. No, sir. I gave them my recommendation, and I hired them.

Q. Who did you give the recommendation to?

A. Richard Burt.

Q. Richard Burt?

A. Because Richard Burt was my supervisor.

Q. He was your supervisor at that time?

A. Yes, sir.

Q. Did Richard ever give you any instructions about hiring?

A. No, sir.

Q. Did Mr. Shipp ever give you any instructions about hiring?

A. No, sir.

* * * *

[III Tr. of Trial 254-55:]

* * * *

Q. Now, at the time that you chose Brown as the assistant supervisor for the motor bank—and I am a little bit confused—I understood that you said that you only—that you considered Brown and the Plaintiff Watson for that position, or maybe I misunderstood in the very beginning.

A. I talked to Richard about Kevin and Ms. Watson and gave my recommendation of Kevin Brown.

Q. All right. In other words, you talked to Richard Burt about both Watson and Brown?

A. Yes, sir.

Q. And made your recommendation of Brown?

A. Yes, sir.

Q. Why did you recommend Brown over Watson?

A. I had worked with Kevin Brown. I knew what he could do as a teller. I felt he could do the job. I thought

he had experience supervising people. Clara did a good job as a teller, but I had heard complaints from tellers on her with problems.

Q. What type of complaints had you hear from tellers about Clara Watson?

A. About them getting along with her.

* * * *

RECROSS OF PATRICIA CULLAR BY MR. BRENDER

[III Tr. of Trial 261-62:]

* * * *

Q. Did you notice that the black employees were any worse employees or did their job any worse than the white employees?

A. No, sir.

Q. In other words, you couldn't say just based on race there was any difference in the way that the people performed their jobs, just looking at their race and how they performed their jobs?

A. No, sir.

* * * *

DIRECT EXAMINATION OF GARY WAYNE SHIPP BY M. McGEE

[III Tr. of Trial 263-79:]

* * * *

Q. For purposes of the record, you are the same Gary Wayne Shipp who testified previously in this case, are you not?

A. That is correct.

Q. Mr. Shipp, let me show you what has been marked as Defendant's Exhibit No. 4 and ask you to identify for the Court that exhibit and tell the Court what it is and what it represents.

A. All right. We have here a salary comparison of the start of the class date, 10-21-79, representing on that

particular page each grade, each job grade in the bank, in which there were both black and white or black and nonblack employees, showing from left to right the grade, overall average salary within that grade, including both blacks and nonblacks, black—

Q. Excuse me. Let me interrupt you, Mr. Shipp.

A. All right.

Q. What was the source for the information that is reflected on these pages?

A. Our payroll records.

Q. All right. Was that the data base that's been referred to at various times that was included in the data base?

A. Yes, it was.

Q. All right. Yet me show you also what's worked as Defendant's Exhibit 6.

MR. McGEE: And, Your Honor, I only have this copy, but it is a computer run.

BY MR. McGEE:

Q. And does that have some information in addition to the data base?

A. Okay. The data base did not include the salaries that we've put in here. The information supplied did.

Q. All right.

A. But, yes, sir.

Q. The underlying information was the payroll; is that correct?

A. Yes, sir.

Q. All right. Now, the data base uses payroll figures for 10-21-79 and 3-1 of '84; is that correct?

A. And the—I think that's all.

Q. May have some other dates?

A. I am not sure, but that's all.

Q. But of these dates that are reflected in Defendant's Exhibit No. 4, which are some—there's actually six

different exhibits that make up this Exhibit 4, are there not?

A. That is right.

Q. And that Exhibit No. 6, Defendant's 6, is the basis for this run, is it not?

A. That is correct.

Q. And so the computer run, No. 6, Defendant's 6, produced or generated these reports that is identified as No. 4; is that correct?

A. That is correct, yes.

Q. All right. Now, on each of these exhibits there are two or three or four different job grades. But I noticed that they are not grades 1 through 8 in each case.

Can you explain to the Court why the grades that are reflected differ from time to time?

A. Yes. As I said a minute ago—or what I mean to say, these are grades in which we have black employees.

Q. All right. For instance, on the very first one that shows the salary computations for grades as of 10-21-79, it shows grades 1, 2, 3 and 4. And I assume from that there were no black employees in any grades above grade 4 at that time?

A. That is correct.

Q. And, likewise, if we go back over to the last one, which is computations for grades as of March 1 of '84, I notice, for instance, that there is no entry for grade 2.

Is that because you no longer have a grade 2?

A. No. We have—We have a classification of a grade 2. There's just—there happen to be no blacks in that category.

Q. All right, fine. But you do have people working in the bank as a grade 2 but none of them are black employees?

A. I believe so, yes.

Q. All right. Now, Mr. Shipp, I'm not going to go through with you each of these exhibits, but just for purposes of the record and for the Court's understanding, each of these exhibits or each of these portions of the

exhibits reflects three figures for each grade that is shown, and that's the overall salary average and then the average of black employees and the average of non-black employees; is that correct?

A. That is correct.

MR. McGEE: All right. Your Honor, we would offer Defendant's Exhibits 4 and 6.

MR. BRENDER: No objection, Your Honor.

THE COURT: Defendant's 4 and 6 are admitted.

MR. McGEE: Your Honor, in the interest of time, I'm going to try to speed up the presentation of what is about 20 different charts that I have labeled as Defendant's Exhibit 5-A through 5—excuse me—5-T, 20 in total. And I will—

THE COURT: 5 what?

MR. McGEE: 5-A through 5—

THE COURT: T?

MR. McGEE: Yes, sir.

May I approach the witness?

I'm just going to hold these up. I realize the Court can, not only see them now, but will have the opportunity to examine them at a later time.

BY MR. McGEE:

Q. Tell the Court, Mr. Shipp, what these charts display?

A. This first chart is salary comparisons by individuals for the time period of 10-21-79, those various individuals in grade 1, salary grade 1.

Q. Let me call your attention to the first black of Defendant's Exhibit No. 4 and ask if the chart substantially displays the same thing that the first page of Exhibit 4 does?

A. Yes, it does.

Q. All right. Or should I say actually the first column of that chart.

Do you see grade 1 shows—

A. Yes.

Q. What is the average of grade 1 on that date?

A. Overall, $580.20.

Q. Find on the chart, if you would, for the Court where that writing would be reflected.

A. That overall average?

Q. Yes.

A. Is the black line here.

Q. And, likewise, it shows a black average salary of how much?

A. $550.

Q. All right. And where is that reflected on this chart?

A. Black average would be the dotted red line.

Q. And then, likewise, the nonblack average is shown, and it is the dotted blue line; is that correct?

A. Right, $600.33.

Q. This particular chart adds one dimension to the picture that is is not presented by Defendant's Exhibit No. 4; is that true?

A. That is correct.

Q. And what is that dimension?

A. Well, it shows each individual as it relates to the salary of all the other individuals in the same grade level.

Q. All right. For purposes of Defendant's Exhibit No. 5-A, which is grade 1 as of 10-21-79, we see a total of five employees who have that grade classification; is that correct?

A. That is correct.

Q. And the black employees are shown as red bars here. This is L. Smoot, which is Lee Smoot, I believe?

A. Lee Smoot, I believe.

Q. And E. Wright who would be Erma Wright?

A. That is correct.

Q. And, likewise, three nonblack employees are shown with blue bars. An R. Hyde and—

A. R. Hyde and William Lipford.

Q. Lipford?

A. Goes as Dan Lipford.

Q. But his true name is William?

A. And Ruth Joyce.

Q. Is this approach or this formula or method followed throughout each of these Defendant's Exhibits 5-A through 5-T?

A. It is, and it goes right on through each period for each grade and does the same thing.

Q. All right. As I understand it, there are some entries on this Exhibit 4 that are not charts. Can you tell the Court what those are?

A. Yes. If you will look on page 3, we show in grade 1 that we have no nonblack average salary; therefore, we did not chart that.

Q. In other words, it appears from—

A. Also on the fourth page, the same situation.

Q. What grade is that?

A. Grade 1.

Q. All right.

A. On the sixth page, I believe, grades 1 and 3, there were no blacks. So we did not chart those.

Q. Nonblacks?

A. Excuse me. Nonblacks.

Q. Okay. It appears in looking at each of those that you referred to just recently there's probably one employee in that. In other words, the average salary for that grade is also the average salary for the blacks?

A. That is correct.

Q. All right. So, obviously, there was no purpose in preparing a chart to show one person's grade?

A. That is right. This would show the same thing.

THE COURT: Let me ask you for clarification: On the charts, do these show every employee in the same grade in the—

THE WITNESS: Yes, sir.

THE COURT: —on the date given?

THE WITNESS: Yes, sir.
THE COURT: All right.

BY MR. McGEE:

Q. Let's go for another date, Mr. Shipp.
This particular exhibit, what is that? I can't see it very well.

A. It's Exhibit 5-I.

Q. All right. And the date for this one?

A. Is 3-1 of '81.

Q. All right.

A. Grade 4.

Q. All right. Have a few more employees to look at here, do we not?

A. Yes, we do.

Q. We show—there's one other indicator on here we did not talk about. There is a yellow line shown at the top of this.
What does that yellow line depict?

A. The yellow line, I believe, is on all the exhibits, and that represents the midpoint of the grade; in other words, the midpoint salary of the grade.

Q. All right. For this particular month or date, rather, there appears to be only two employees who actually are being paid at the midpoint?

A. Paid at or exceeding the midpoint, that is correct.

Q. Is that an unusual situation?

A. No.

Q. As I understand the way your salary grade ranges work, they are changed from time to time, are they not?

A. That is correct.

Q. And about how often are they changed?

A. It is really a decision made by the bank as to what the minimum salary it will hire a person with no experience in grade 1 is, and the formula that was created by our consultant starts—

Q. Let me break that down because I have heard this before, and it took me two or three times before I really followed what you were talking about.

A. All right.

Q. But let's just say that the grade 1 employee, you decide that the minimum that you are going to hire anybody at the bank today is how much, if you know?

A. I don't know.

Q. Well, let's just say for purposes of argument it's $800 a month, just to pick a figure.

A. All right.

Q. All right. You then take that as the basis for the minimum for grade 1; is that correct?

A. That is correct. Not the training minimum, but the minimum.

Q. Because there are minimums beneath the range due to training figures?

A. That is correct.

Q. Go through, then, how you adjust the other ranges in relation to grade 1.

A. Beginning with grade 1, minimum salary, there is a percentage that is applied to that to come to a midpoint, and then there's another percentage applied to that to go to maximum for that grade. And then at the time we set up our program we had to make a decision on how much difference between grade 1 minimum and grade 2 minimum and grade 3 and so on. In other words, we—I believe at that point it was like five and a half percent from the minimum of grade 1 to the minimum of grade 2, was like a five and a half percent figure, and it went that way all the way through.

Q. So if I am following you, then once you established that range for grade 1, you compute that fraction or that percentage or whatever it is, and that tells you what grade 2 should be, and you build on 2 up to 3 and so forth all the way up to the 9 pay grades?

A. Yes, sir.

THE COURT: Here again, for clarification, five and a half percent between each one?

THE WITNESS: That was, I believe, Your Honor, the one we used to begin with us.

BY MR. McGEE:

Q. Has that figure changed from time to time?

A. Yes, it has, and I cannot recall now. I think we expanded it in—oh, a couple years ago to what I think was 6 percent. In other words, we spread them.

Q. Is it possible, Mr. Shipp, that even though these ranges go up in a step progression, that someone who is, for instance, in a grade 5 and is earning above the median and perhaps at the high end of the range for grade 5 might be earning more than someone who is at the low end of grade 6?

A. That is possible, yes.

Q. Do they overlap to some extent?

A. Yes, yes.

Q. There was some testimony earlier today about somebody—I don't remember the circumstances—but that is not a common occurrence but no, sir not rare?

A. No, it is not rare.

Q. Also you substituted this—I'll step back to the podium.

You set up this program of grades and so forth back in '79 I believe was your testimony. Have all the jobs that you established as grade 1 and grade 2 and so forth all through, have those job designations remained the same throughout the administration of this program?

A. You are talking about is a teller the same grade as when we set it up?

Q. Yes, sir.

A. There are some things that have changed due to the duties of those jobs changing, and their importance to the bank as a job.

Now, some of those jobs have changed. For instance, tellers have been changed from a grade 4 originally to now they are all a grade 5.

Q. Okay. And I believe there was a change made one time with regard to customers.

A. New accounts.

Q. New accounts, yes.

A. It was a grade 4, and due to the recent changes over the years and deregulation banking and a lot of the new accounts we were offering, it was important that the job be reevaluated and became a grade 6.

Q. So it went up actually two whole grades?

A. Yes.

Q. Now, Mr. Shipp, with regard to these changes, the spacing between the grades and the changing of the jobs that are in a particular grade that are made from time to time by the bank, are they applied uniformly throughout or across the board as to all employees of the bank?

A. Absolutely, yes.

Q. In making those decisions to determine whether the new accounts job is a grade 4 or a grade 6 or the grade of teller is a grade 4 or grade 5, do you have give any consideration as to how that will impact any of your bank employees?

A. No, not at all. In fact, when you evaluate a job, you cannot even consider the people involved in that job.

Q. It is true, is it not, that you are attempting to ignore who the incumbent is for that very reason. We don't want to say this person is important to the bank; and, therefore, he or she ought to be a 6. You say what is the job, how important is the job worth.

A. What is the job worth, what is its value to the bank.

Q. And as the duties and the areas in which banking changes, those responsibilities and the value of that particular job to the bank may change by way of increase or, I suppose, decrease?

A. Yes. Mainly—Yes. Can be either way. Of course, the bank has grown, too, and that has a bearing on it also.

Q. Okay. Let me again call your attention to the charts, Mr. Shipp. And I talked about a lot of random selection yesterday. That's what I am doing now, just grabbing some that have not some people in them, rather than having . . .

Let me find one first for you that doesn't have . . . one that has a few on it.

Grade 4 as of 10-21-70, and that is Exhibit 5D; is that correct?

A. That is correct.

Q. This shows one person over at the far right who has—he's a nonbank employee, Anders, who has a rather high salary.

Could you explain to the Court why Mr.—is it Mr. Anders?

A. It is Mr. Anders.

Q. —why his salary is so much greater than any of the other people on the chart?

A. The main reason is that Mr. Anders was a security guard, and he was at the bank, and we—when we developed our salary administration program, his grade was set out at 4, but you can't—you know, it was impossible or somewhat impossible to hire anybody at that salary. I mean, he just really shouldn't have been on the chart.

Q. A rose is a rose is a rose, but maybe a grade 4 is not always a grade 4?

A. They set their own price with what they go to work for, and you either pay it or you don't.

Q. Does the bank usually hire security guards?

A. No. We contract that.

Q. So that problem, I guess, in the way the system was administered is no longer a problem?

A. That is correct.

Q. Let me call your attention to the first page of Defendant's Exhibit No. 4 where you see the averages for the grade 4 employees, overall average and the black and nonblack averages.

You'll see on nonblack it shows a $633.70 average salary; is that correct?

A. That is correct.

Q. And I suppose that exceeds the average for the overall grade.

Would Mr. Anders' presence in that nonblock group have impacted that score significantly, in your opinion?

A. Absolutely, yes.

Q. Let me show you, Mr. Shipp, Defendant's Exhibit 5P, which is the 3-1 of '83 grade 6 chart. There are a total of six employees represented, one black employee, Hill. Is that Paula Hill?

A. Yes, that is Paula Hill.

Q. She was present in court here this morning?

A. That is right.

Q. All right. And are all of these people new accounts clerks, or are there other jobs in there also?

A. There appears to be one other person there, Johnson. I believe that's Don Johnson.

Q. She's a grade 6 also. What is her job?

A. In 3-1 of '83, she was, I believe, assistant supervisor or in bookkeeping.

Q. All right. This Watson that's shown as the fourth from the left, that is not Clara Watson, is it?

A. No. That is Patricia Watson.

Q. All right. Now, just to demonstrate for the Court how percentages can be affected rather significantly by changes of one person, let's look to the 3-1 of '83 entry on Defendant's Exhibit No. 4, which is the next to the last page, and call your attention to grade 6. And the average for nonblacks is $971, and the average for blacks is $950.

That average was Paula Hill, wasn't it; there was only one?

A. There was only one, right.

Q. Let's flip over on 3-1 of '84 for grade 6.

This demonstrates Paula Hill has apparently received an increase.

Flip over to the last page of Defendant's Exhibit 4, and she now shows to be almost in the middle of the range. There are two employees that earn slightly more than she does, and two employees that earn slightly less. Is that correct?

A. That is correct.

Q. All right. And just to carry it a little bit further, here is another situation. That is 5-T, Defendant's Exhibit 5-T for 3-1 of '84 on grade 7.

A. That is right.

Q. Likewise, one employee in that range appears—or this is Sylvia Harden, is it not?

A. That is correct.

Q. She appears to be making the same as one non-black employee, greater than another, and less than some others?

A. Correct.

Q. All right. And without going into the rest of these, Mr. Shipp, this procedure was followed throughout each of these exhibits, Defendent's Exhibit 5-A through -T?

A. Yes, it was.

MR. McGEE: Your Honor, we would offer Defendant's Exhibits 5-A through 5-T.

MR. BRENDER: No objection, Your Honor.

THE COURT: Admitted.

* * * *

CROSS EXAMINATION BY MR. BRENDER

[III Tr. of Trial 307-08:]

* * * *

Q. Can you explain why blacks have lower average evaluations than whites do?

A. Can I explain why?

No, I can't.

Q. All right.

A. Their job performance is the only thing that it can be, period.

Q. From your observation in the bank, I take it when you say no you can't explain it, when you have not noticed yourself any lower performance on behalf of blacks than on whites?

A. Not until we sat down and put this all together in the data base.

Q. So you did do that, you did average those and look at what those things were?

A. Sure did.

Q. Before you came to Court?

A. Sure did.

Q. So you had that information, and you had some of those averages and percentage and do some of those things, but you chose not to have them analyzed to see what the statistical significance of those things were before you came to court. Is that right?

A. That is correct, that is correct.

* * * *

[III Tr. of Trial 318-20:]

* * * *

Q. You were here and present in court when I went over with Dr. Tom Marshall from Your Defendant's Exhibit 2 what the applicant flow was, both black and non-black, for these 35 jobs that you had selected out, and you had gone up two weeks and selected all the applicants, right; you gave us these figures?

A. I was present when you talked to him, yes.

Q. You had looked at this applicant flow just like you did the statistical—I mean, just like you did the salary evaluations and all the other data, and you or somebody that was assisting you had figured out these rates of hire for blacks and whites were not particularly favorable to the bank's position, had you not?

A. I'm not sure what we referred to. Referring to those numbers right there?

Q. Yeah, that Exhibit 42 there.

A. On what basis were they not favorable?

Q. That the black hire rate or white hire rate is about three times that of the blacks in just about every instance.

A. I don't know if there's—I can't tell you if that is favorable or not favorable.

Q. You mean you think it is all right that you are hiring blacks at a rate that is one third that of whites?

A. I am not saying it is all right.

Q. All right, but you didn't think that that indicated discrimination in your hiring practices?

A. I don't think so, no.

Q. You don't think so?

A. Not at all.

Q. You think that is acceptable?

A. That is the way it was done.

Q. And based on that, you wouldn't say—because you feel it is acceptable, I take it you wouldn't have any reason to change the bank's practices; is that right?

A. I certainly would not.

Q. And we could say the same thing about the figures on Plaintiff's Exhibit 43, which were also the figures that you have no Defendant's Exhibit 2; is that right?

A. I believe—What was the question?

Q. Well, would your feeling be the same, there shouldn't be anything done or changed, given the rates of hire of blacks and nonblacks on Exhibit 43, which was taken from the—the numbers were taken from your Defendant's Exhibit 2?

A. No, I don't see anything we need to change, except keep a little better records on whether there was a job opening and someone comes and applies.

Q. You don't feel like there is discrimination occurring at the bank such that you ought to do something about it or such as seek blacks or any positions or do something about it—actually, you are getting a good applicant flow—and do something about your hiring practices; you see no reason to do that, do you?

A. I certainly do not.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(Title Omitted in Printing)

MEMORANDUM OPINION AND ORDER

There is pending before the Court plaintiff's motion for class certification. A hearing on said motion was held on June 17, 1982. After careful consideration of the motion, arguments, and brief the Court makes the following ruling.

I. *Subject Matter Jurisdiction*

Plaintiff brings this case claiming that defendant, Fort Worth Bank and Trust, unlawfully discriminates against Blacks in hiring, compensation, initial placement, promotions, termination, departmental segregation, leave policy, and other terms and conditions of employment. Plaintiff has moved to certify as a class all those who are similarly situated to plaintiff.

Defendant asserts that subject matter jurisdiction over the Title VII class claim is lacking where plaintiff presented no class allegations to the EEOC at the administrative level, and the EEOC investigated only the plaintiff's individual claims of discrimination. The Court disagrees. The proper scope of the judicial complaint in a Title VII action is limited to the scope of the EEOC investigation which can "reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The Court finds that all claims now brought by plaintiff in this class action are *either* issues that were raised by plaintiff in her administrative complaint, *or* they are "issues that

may reasonably be expected to grow out of the administrative investigation" of her administrative complaint. *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 372 (5th Cir. 1977). As the Fifth Circuit stated in *Hebert v. Monsanto Co.*, 682 F.2d 1111 (5th Cir. 1982):

> Contrary to defendants' contention that a plaintiff may raise only the issues raised in the charge filed with the EEOC and investigated by the EEOC, a plaintiff may raise issues in his judicial complaint which were not investigated by the EEOC so long as the issues are like or related to the allegations in the charge, or could reasonably be expected to grow out of the charge of discrimination.

Hebert at 1133.

Thus, the Court finds it has jurisdiction over these claims.

II. *Prerequisites of Rule 23*

In order for a class to be certified the plaintiff must prove at a class certification hearing a ..... Rule 23(a), Federal Rules of Civil Procedure and the class ..... within one of the categories of class actions set forth in Rule 23(b), F.R.C.P. *General Telephone Company of the Southwest v. Falcon*, 102 S.Ct. 2364 (1982).

Thus, the sole question before the Court is whether plaintiff has met the burden of showing that the prerequisites of Rule 23, F.R.C.P. have been satisfied.

A. *Numerosity.*

Under Rule 23(a)(1) F.R.C.P., plaintiff must prove that the class is so numerous that joinder of all members is impracticable. However, [i]t is not necessary that the members of the class be so clearly identified that any member can be presently ascertained." *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970). *See also Jones v. Diamond*, 579 F.2d 1090, 1100 (5th Cir. 1975); *Mertz*

v. Harris, 497 F.Supp. 1134 (S.D. Texas 1970). Plaintiff produced evidence at the hearing which indicates that the class would constitute over one hundred people (See Plaintiff's Exhibits #1 and #2). Using defendant's position that the opening date for membership in a Section 1981 class in this case is October 21, 1979, the Court counts 4 blacks who would be members of the class from 1979, 42 blacks who would be members of the class from 1980, 48 blacks who would be members of the class from 1981, and at least 9 blacks in the class from 1982 (the figures are incomplete for 1982 and the Court anticipates the possible addition of blacks to the class from June 1982 to the present date). See Plaintiff's Exhibits #1 and #2. In addition, plaintiff testified that some blacks approached the bank for application forms and were not given those forms. These would not be included in the figures discussed above since Plaintiff's Exhibit #1 is an "Applicant Flow Log" based on the number of applications which were actually completed and returned. Furthermore, the 15 black employees whom defendant hired since October 21, 1979 (see Defendant's Motion and Memorandum of Authorities in Opposition to Class Certification, note 12 at page 51) would also be members of the class, as persons subject to promotional discrimination. Thus, the Court holds that plaintiff has met the numerosity prerequisite.

B. *Common Questions of Law or Fact*

Under Rule 23(a)(2), plaintiff must prove that "there are questions of law or fact common to the class."

Defendant asserts that the individual Clara Watson, in her claim of promotional discrimination has no "commonality" with those possible claims by other blacks who applied, but were not even hired as employees of defendant. However, defendant concedes that the recent Supreme Court decision in *Falcon* does not "absolutely preclude certification of an across-the-board class" (Defendant's Motion and Memorandum of Authorities in Opposi-

tion to Class Certification at page 9), and instead requires plaintiff to present specific facts supporting each of the prerequisites of Rule 23. As the Supreme Court stated in *Falcon*:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making processes.

Falcon, n.15 at 2371.

Plaintiff, at this stage, has presented exactly that type of evidence. It should be noted that the plaintiff in *Falcon* had "no allegation that those who made the hiring decisions are the same persons who determined who was promoted to field inspector. Thus there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent." *Falcon* at 2373.

In contrast to the plaintiff in *Falcon*, plaintiff in the present case had presented evidence suggesting that Mr. Gary Shipp is responsible for both the hiring and promotion at defendant bank, and has been for over five years. Although Mr. Shipp did testify that the supervisors of the respective departments made hiring decision (Tr. at 167) he also explained:

> Question by Mr. Brender: Okay. And I take it on personnel decisions, hiring, determination, et. cetera, you obviously ask for input from others within the bank, but I take it you have the ultimate final say in those decisions, is that correct?

Answer by Mr. Shipp: Yes, I discuss it with the supervisors when a decision is made by them.

(Tr. at 140)

Although defendant asserts that Mr. Shipp does not make the hiring decisions, it is obvious he does have "input" into those decisions, with the potential to "sway" or otherwise influence their outcome through his discussions with the supervisors. The evidence before the Court shows that Mr. Shipp reports directly to the bank officers and has never advanced a black to a position of supervisor. His alleged comments to plaintiff Clara Watson about the ability of blacks to handle large amounts of money drew conflicting evidence at the hearing, but the evidence at least suggests there is a question of fact here to be resolved, which is common to both plaintiff and other blacks who applied and were not hired at defendant bank. However, the Court wants to strongly point out that this holding is in no way a ruling on the merits of plaintiff's contention, and that the evidence has merely shown a tendency that defendant may have discriminated against blacks in hiring and promotional decisions. *See Vuyanich v. Republic National Bank of Dallas*, 82 F.R.D. 420 (N.D. ..... 1979).

C. *Typicality*

Under Rule 23(a)(3), plaintiff must show that "the claims or defenses of the representative parties are typical of the claims or defenses" of the class.

Again the Court finds conflicting evidence as in the issue of hiring practices. While plaintiff testified that certain named blacks were denied the opportunity to make application to work for defendant bank and other named blacks were turned down for employment, defendant asserts that these names do not appear on the flow chart and Mr. Shipp testified that no one was denied an application. Thus, there is at least a question of fact to be resolved on this point.

Also, defendant attacks the statistics and binomial test offered by plaintiff as not being limited to the relevant time frame (October 21, 1979, to May 1982), and further as being based purely on randomness, rather than taking into account the respective qualifications of the applicants who comprised the applicant pool.

The Court has reexamined Plaintiff's Exhibit No. 1, to consider the statistics of the time period from October 21, 1979, to May 1982. Such a reconsideration results in the following figures by this Court's calculations of Job Applicants:

	Black	White	Total
1979 (Oct. 21-Dec.)	4	9	13
1980	42	161	203
1981	48	147	195
1982 (Jan.-May)	9	41	50
	103	358	461

This yields 22% of the total of job applicants being black applicants and 78% of the total of job applicants being white applicants. This does not vary greatly from the original 24.7% black applicants and 75% white applicants presented in Plaintiff's Exhibit #2.

A recalculation of "Hirees" from October 21, 1979 results in the following:

	Black	White	Total
1979 (Oct.-Dec.)	0	3	3
1980	1	22	23
1981	1	21	22
1982 (Jan.-May)	0	3	3
	2	49	51

This yields approximately 4% of the total number of hirees being black. That compares unfavorably with the Plaintiff's Exhibit #2 showing 9% of total hirees being black.

Although this Court will not attempt to recalculate the probability of a pool of applicants with 22% blacks resulting in a total number of hirees of which 4% are black, the Court will at least recognize that the probability of this event happening at random would be even less than the probability which was given to plaintiff's original figures in its exhibit no. 2. (a pool of applicants with 22.5% blacks, resulting in a total number of hirees of which 9% are black)

Defendant also attacks the "randomness" of the statistics, stating that statistics must reflect the qualifications of the applications. However, Mr. Shipp testified that there were "no specific qualifications" at entry level positions for applicants (Tr. at 167), and he further testified that he had no knowledge of a fewer number of blacks being qualified than whites qualified among those who left their applications at his bank. (Tr. at 157).

Again the Court stresses that it is not ruling on the merits of plaintiff's complaint, but that it is finding enough evidence to suggest an inference that there is a possibility of racial discrimination in these hiring decisions.

With regard to promotions, plaintiff has testified as to her own experience of applying for promotions and being denied the promotion, which went to a white applicant on numerous occasions (Tr. at 22-38). There is no question such experience would be "typical" of other blacks who have requested and been denied promotions.

Furthermore, defendant has not offered statistics to rebutt plaintiff's statistics on hiring and promotions. When asked if he had used statistical tests for race in his preparation for the class certification hearing, defendant's statistician, Mr. John Sennetti replied he had performed those tests, but had not brought the computer sheets with him, stating "Because they were not important. If race is not significant, I thought—and in fact, I was instructed to bring the variables that were important." (Tr. 244)

Plaintiff also asserts that the *compensation* for bank employees reveals racial discrimination. Here the Court has more difficulty. The statistics offered by defendant which compare salaries of other employees to those of plaintiff (and compare salaries of blacks and whites) would tend to show the defendant's position of denial *as to discrimination in compensation* is perhaps correct. As to the compensation issue, the Court finds the following comment in *Vuyanich v. Republic National Bank* to be appropriate:

> The Bank's evidence introduced to rebut plaintiff's statistics tends to show that its position of denial may not be insubstantial. But the sum of plaintiffs and defendants statistics points to the conclusion that in the liability phase of this proceeding, the Court will have the duty of resolving certain contested issues of fact and law; that is, common questions do exist.

Vuyanich at 431-432.

Finally, in the area of initial placement, work assignments, terminations, departmental segregation, and leave policy, the Court is impressed with defendant's rebuttal evidence. The Court must at this time, however, find plaintiff has alleged facts, which, if true, might show a policy of racial discrimination in these areas.

The Court notes that the typicality requirement does not require that an identical harm result from the same type of practice. *Vuyanich* at 433. *See also, Satterwhite v. City of Greenville*, 478 F.2d 984 (5th Cir. 1978). Thus, the Court holds that plaintiff has submitted enough evidence to meet the typicality prerequisite.

D. *Adequate Representation*

Under 23(a)(4), plaintiff must show that "the representative parties will fairly and adequately protect the interests of the class." This factor is usually analyzed

from two perspectives; from the standpoint of the class representative and from the standpoint of the class representative's attorney. Adequacy of class representation is crucial to assure that the absent class members are not deprived of due process and that the final judgment is binding. *Hansberry v. Lee*, 311 U.S. 32 (1940).

As to plaintiff herself, there is no contention that her interests are antagonistic to the class or that she is involved in a collusive suit. The test of adequacy is that the representative must be of such a character as to assure the vigorous prosecution of the action so that the class member's rights are certain to be protected. *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *Scott v. City of Anniston*, 90 F.R.D. 267, 281 (N.D. Ala. 1981).

The Court finds that plaintiff has sufficient knowledge of this suit and has sufficient interest so that she would "vigorously litigate the suit." *Hernandez v. United Fire Insurance Co.*, 79 F.R.D. 419 (N.D. Ill. 1978). As far as the actual funding of the costs of suit, the Court finds that the arrangement between plaintiff and her attorney is both proper and would make available enough funds to litigate the suit. *See* American Bar Association, Committee on Ethics and Professional Responsibility, Informal Opinions 1283, 1284 and 1326.

Plaintiff's attorney is a member of a two man law office which has a large number of open files. The Court has some doubt as to his capacity, as far as time is concerned, in handling this case. However, plaintiff's attorney has appeared before this Court on several occasions, including class action suits, and the Court has found him to represent his clients fully and capably. The Court finds that this latter factor, at least at this point, outweighs any doubts the Court has about quality of representation which would be provided to the class members.

Thus, the Court finds that plaintiff has submitted enough evidence to meet the adequate representation requirements.

E. *Action on Grounds Generally Applicable to the Class*

Since the Court has found that plaintiff met the prerequisites of 23(a), the Court must also find that plaintiff meets the requirement of 23(b)(2), before the class can be certified. *See Hugg v. N.D. Cass Co.*, 485 F.2d 710, 712 (5th Cir. 1973).

Under 23(b)(2) plaintiff must show that defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

As stated by Judge Higginbotham:

> The term "generally applicable" has been interpreted to mean "that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly, his acts apply generally to the whole class" . . . Rule 23(b)(2) is closely linked to the 23(a)(2) requirement that the plaintiff show existence of a class raising "common questions of law or fact."

Quigley v. Braniff Airways, Inc., 85 F.R.D. 74, 79 (N.D. Tex. 1979).

The Court has already found that plaintiff met the requirements of 23(a)(2), and that finding and the discussion as to that finding are directly applicable to the (b)(2) prerequisite. The Court finds that plaintiff has shown that defendant acted in a way which applies generally to the whole class.

However, it should be kept in mind, as pointed out by Judge Higginbotham:

> that at this stage of the proceeding the issues are whether common questions exist and whether the defendant allegedly acted or failed to act in a man-

ner generally applicable to the class—not whether the defendant is actually guilty of discrimination.

Quigley v. Braniff Airways, Inc., supra at 79.

F. *Class Description*

The description of the class must be sufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a member. *See De Bremaecker v. Short*, 433 F.2d 733 (5th Cir. 1970); *Barlow v. Marion County Hospital District*, 88 F.R.D. 619 (M.D. Fla. 1980).

1. *Relief Sought*

As far as plaintiff's claim for injunctive and declaratory relief, the Court is not opposed to amorphous or indeterminate class definition. However, as to plaintiff's claim for back pay, benefits, and damages, the Court expresses deep concern that such relief will be received by those who are not really entitled to such relief, if the definition of the class is broadly drawn. It is quite possibly true that some Blacks were treated fairly and on an equal basis with Whites, therefore as to them such monetary relief would not be equitable The Court will therefore, conditionally certify the class as to the issue of monetary relief and await the outcome of further discovery and the trial on the merits to determine whether such relief is feasible and justified.

2. *Time*

Defendant asserts that the opening date for this class is October 21, 1979. Indeed, the Court has examined evidence presented by plaintiff involving dates subsequent to October 21, 1979 to determine if a class should be certified. However, plaintiff has offered credible evidence tending to show the defendant discriminated against Blacks as early as January 28, 1979, and asserts that the United States Supreme Court Opinion in *Zipes v.*

Trans World Airlines, Inc., 102 S.Ct. 1127 (1982) supports the proposition that the opening date for class membership may be earlier than that indicated by statutes of limitation. Plaintiff is correct that the Supreme Court stated the filing of a "timely charge of discrimination with the EEOC [was] not a jurisdiction prerequisite to suit in federal court," *Zipes* at 1132, however, the Court sees no evidence that waiver, estoppel, or equitable tolling should apply in this case. Thus the opening date for class membership is October 21, 1979. *See Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 813-15 (5th Cir. 1982)

III. *Conclusion*

The Court hereby CERTIFIES the following Rule 23 (b)(2) Class

All Blacks

(a) presently employed by defendant; or

(b) who have, at anytime since October 21, 1979, been employed or sought employment with defendant;

(c) who may in the future seek employment by defendant.

Signed this 3 day of March, 1983.

/s/ Eldon B. Mahon.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(Title Omitted in Printing)

MEMORANDUM OPINION

Plaintiff Clara Watson, a black female, alleges that Defendant Fort Worth Bank and Trust discriminated against her and other persons similarly situated on the basis of race, in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The Court certified a class consisting of blacks who applied to or were employed by defendant on or after October 21, 1979 or who may submit employment applications to defendant in the future. Plaintiff seeks declaratory and injunctive relief, back pay and benefits. Defendant denies discriminating against plaintiff or other black employees or applicants and, further, alleges that the class is overbroad and does not comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Findings of Fact

1. Plaintiff Clara Watson is a black female resident of Tarrant County, Texas.

2. Defendant Fort Worth Bank and Trust is a banking corporation that is incorporated under the laws of the state of Texas and is doing business in Tarrant County, Texas.

3. Plaintiff has a high school education and nine hours of college credit in business related courses. She worked as a cashier at Montgomery Wards department store for nine years before being employed by defendant.

4. Plaintiff was hired by defendant on August 17, 1973 as a proof operator. Approximately two years later she was promoted to the position of teller trainee. After a two to three month training period she became a teller in defendant's motor bank on January 1, 1976. She was transferred to the Bank's main lobby in late 1979 and was promoted to the position of commercial teller on February 2, 1980.

5. In February 1980 the position of supervisor of tellers became open due to the the resignation of Assistant Cashier Brian England. The position involved supervision of approximately eleven tellers in the Bank's main lobby. In addition, the motor bank supervisor, who had authority over approximately six tellers in the motor bank, reported to the teller supervisor. Among the persons who applied for the position were plaintiff; Richard Burt, a white male who was supervisor of the bookkeeping department; Gail Levitt, a white female who was supervisor of tellers in the motor bank; and Pat Cullar, a white female commercial teller.

6. Until February 1981 the teller supervisor reported directly to Gary Shipp, who has been a senior vice president and cashier at the Bank since 1977. Accordingly, Gary Shipp made the decision in February 1980 of whom to promote to the teller supervisor position.

7. Shipp selected Richard Burt as England's replacement as teller supervisor. Burt was hired by the Bank in May 1976 as a part-time teller in the motor bank. At that time he was a full-time student at Texas Wesleyan College. Beginning in January 1977 he was a full-time employee in the general ledger department for approximately one year and then worked as a credit analyst for six months. He became supervisor of the bookkeeping department in 1979. Burt obtained a bachelor's degree in banking and finance from Texas Wesleyan College in May 1980.

8. On December 20, 1979 Gary Shipp had evaluated Burt's performance as a supervisor as "competent" to

"commendable" and his potential as "considerable" to "outstanding."

9. Also in February 1980 Gail Levitt resigned from her position as supervisor of tellers in the motor bank. Six or seven persons applied, among them plaintiff and Pat Cullar, who was selected for the position.

10. Both plaintiff and Pat Cullar were commercial tellers when the motor bank supervisor position came open in February 1980. Plaintiff had worked for the Bank for six and a half years compared to Cullar's two and a half. However, Cullar had almost eighteen years experience in banking in Wichita Falls, Texas and Fort Worth, Texas, with more than sixteen years experience in all teller areas, while plaintiff had less than seven years banking experience. Plaintiff's job performance rating by her supervisor, Gail Levitt, in August 1979 and Cullar's rating by her supervisor, Brian England, in September 1979 resulted in comparable ratings. Out of a potential score of 104 points in ten categories, plaintiff scored 70 and Cullar scored 72. Both plaintiff and Cullar had been given low ratings on their ability to get along with supervisors and coworkers on the job. Their records and qualifications were substantially the same, except for Cullar's more extensive banking experience.

11. Shortly after Burt's selection as teller supervisor, plaintiff was given additional duties and responsibilities as his unofficial assistant. Among her duties were making work assignments, authorizing the payment of checks drawn in excess of a specific amount and helping other tellers with discrepancies in their accounts. Cullar had acted in the same capacity with respect to Brian England when he was her supervisor in the lobby. While working as Burt's assistant, plaintiff experienced some resentment from other tellers in connection with the performance of her supervisory duties. Although it was plaintiff's function to approve checks when Burt was unavailable to do so, some of the other lobby tellers routinely bypassed plaintiff and had their checks approved by the

drive-in supervisor, Pat Cullar, or the bookkeeping supervisor.

12. In January 1981 plaintiff took a leave of absence from her employment with the Bank to undergo foot surgery.

13. While plaintiff was on leave in January 1981 Burt was promoted to assistant vice president in charge of operations. His promotion necessitated the posting of the lobby teller supervisor position. Among the applicants were plaintiff; Cullar; Sylvia Hardin, a black female commercial teller; and Patsy Weatherly, a white female who was supervisor of the proof department. Richard Burt chose Pat Cullar to replace him.

14. As a result of Cullar's promotion, the motor bank supervisor position came open. Among the applicants were plaintiff, Hardin and Kevin Brown, a white male teller in the motor bank. Based on Cullar's recommendation, Burt selected Brown for the position.

15. Kevin Brown was hired as a part-time teller in the motor bank on October 29, 1979, when he was twenty years old. He became a full-time teller in the motor bank on May 15, 1980 and served as Cullar's assistant for six months. His previous experience included seven months as a salesperson at Monnig's department store and approximately four years at Six Flags Over Texas, including some work as a supervisor of teenage seasonal employees.

16. Brown's employment performance was rated by Cullar in January 1980, scoring 80 points out of a possible 104, and in January 1981, scoring 89 points out of 104. Richard Burt gave plaintiff a rating of 84 in July 1980, which was her last written evaluation.

17. Plaintiff filed a charge of discrimination with the Fort Worth Human Relations Commission and the EEOC on January 28, 1981. A notice of right to sue was issued on September 24, 1981 and plaintiff filed suit on October 21, 1981.

18. Plaintiff did not return to work after taking sick leave in January 1981. She underwent two operations on her foot and resigned on August 7, 1981.

19. In September 1981 Pat Cullar rated Kevin Brown's performance as motor bank supervisor as "fair" and his potential as "some." He submitted his resignation on December 3, 1981.

20. Since 1975 the Bank has not had a black director or officer. There has been one black supervisor, Sylvia Hardin, who became assistant supervisor of the motor bank in October 1983.

21. In 1981 the Bank employed 68 whites and 9 blacks. In 1982 the Bank employed 72 whites and 9 blacks. In 1983 the Bank employed 71 whites and 7 blacks. Nine blacks and 71 whites were employed at the time of trial.

22. On March 4, 1983 the Court certified a class consisting of all backs who have been employed by or applied for employment with the Bank since October 21, 1979 or who may apply to the Bank in the future. The Court found that the class of applicants numbered over 100 and the class of blacks who were currently employed by the Bank or who had been employed by the Bank numbered fifteen as of June 1982.

23. Hiring decisions at the Bank are made by the department supervisors, who then submit their decisions to Gary Shipp for formal approval. Shipp rarely vetoes hiring decisions made by those supervisors reporting to him. Shipp personally interviews some applicants but makes the final hiring decisions only for those persons working directly under his supervision. During all periods relevant to this suit, Shipp had final authority over all personnel matters.

24. Performance evaluations and promotion decisions are made by the supervisors for those employees under their authority. Since 1978 employees have been given yearly written evaluations which are completed by their supervisors. Salary increases are calculated on the basis

of the performance ratings. The supervisors present the evaluations to the Salary Review Committee, which consists of the president or executive vice president of the Bank, the officer in charge of personnel and the senior operations officer. Occasionally a change in the Supervisor's rating is made, with the concurrence of the full committee. Gary Shipp has been a member of the Salary Review Committee during the entire period relevant to this case. However, he has no more influence over the employee ratings than do the two other committee members.

25. Any findings of fact which should be a conclusion of law is hereby made a conclusion of law.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this action pursuant to 42 U.S.C. § 2000e-5, 42 U.S.C. § 1981 and 28 U.S.C. § 1343. Venue is proper in the Northern District of Texas.

2. Defendant Fort Worth Bank and Trust is an employer within the meaning of 42 U.S.C. § 2000e(b).

3. Plaintiff complied with the procedural requirements for filing a Title VII claim pursuant to 42 U.S.C. § 2000e-5 by timely filing an EEOC complaint and by filing her suit within 90 days of receipt of a notice of right to sue.

4. The elements of proof under § 1981 and Title VII are the same. *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980).

5. Plaintiff must carry the initial burden of establishing a prima facie case of discrimination. She must show (i) that she belongs to a protected group; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that she was rejected, despite her qualifications; and (iv) that after her rejection, the position remained open and the employer continued to seek and/or select an applicant with similar qualifications. *McDonnell Douglas Corporation v. Green*,

411 U.S. 792, 802 (1973); *Canino v. United States Equal Employment Opportunity Commission*, 707 F.2d 468, 470 (5th Cir. 1982). If a plaintiff proves a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. The defendant's burden is relatively light, in that "the defendant need not persuade the court that it was actually motivated by the proffered reasons . . . it is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

If the defendant does not present sufficient evidence to raise a genuine issue of fact as to whether it discriminated, the plaintiff prevails. If the defendant does succeed in rebutting the presumption of discrimination, the burden shifts back to the plaintiff to show that the defendant's stated reason was a pretext for discrimination. She may prove this by showing that race played an impermissible role in the employment decision or by showing that the nondiscriminatory reasons offered are not credible. *Lincoln v. Board of Regents of University System*, 697 F.2d 928, 938 (11th Cir. 1983).

6. Plaintiff has presented a prima facie case of individual employment discrimination. She is a member of a protected class, she applied for and was qualified for the position of lobby supervisor and motor bank supervisor in 1980 and 1981 and she was not selected.

7. Defendant has met its burden of proof by presenting legitimate nondiscriminatory reasons for each employment decision. Richard Burt had worked as a teller and had supervisory experience at the Bank, he had been given excellent performance evaluations and he was nearing completion of a college degree in banking and finance when he was promoted to teller supervisor in February 1980. Although plaintiff and Patricia Cullar had been given almost identical employee ratings, defend-

ant offered a nondiscriminatory reason for preferring Cullar for the motor bank position in February 1980 on the ground that she had eleven more years experience in banking than plaintiff had. The Bank had a legitimate reason for choosing Cullar over plaintiff for teller supervisor in February 1981 because of her experience as motor bank supervisor.

The Court is more troubled by the Bank's decision to promote Kevin Brown instead of plaintiff to motor bank supervisor in February 1981. As is evident by Brown's poor rating as supervisor and his subsequent resignation, hindsight shows his promotion to be an unwise decision. However, in order to satisfy its burden of proof the Bank need only articulate legitimate, nondiscriminatory reasons for Brown's promotion. The record shows that Cullar regarded Brown highly for his performance as a teller in the motor bank and his experience as her assistant. Further, he got along well with other employees, while plaintiff had had some difficulty in her relationship with coworkers and with tellers whom she supervised as Burt's assistant. The Bank also relied on Brown's experience supervising thirty to forty temporary workers at Six Flags Over Texas. Finally, the Court notes that plaintiff was out on sick leave when the lobby and motor bank positions came open in 1981 and that she subsequently underwent surgery on her foot twice. In contrast, Brown was available immediately to assume the motor bank position. Accordingly, the Court finds that, in retrospect, the promotion of Brown was a poor judgment call but that defendant had legitimate, nondiscriminatory reasons for making such a decision.

8. Plaintiff has not shown that the reasons articulated by the defendant for choosing Burt, Cullar and Brown over her were pretexts for racial discrimination.

9. A class action must satisfy the prerequisites set out in Fed. R. Civ. P. 23(a): (1) the class is so numerous that joinder is impracticable; (2) there are common questions of law or fact; (3) the claims or defenses of

the class representative are typical of those of the class; and (4) the representative will fairly and adequately represent the interests of the class. Until recently, courts have been more lenient in finding compliance with Rule 23 in Title VII cases than in other types of cases, permitting the named plaintiff to raise across-the-board *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982) the Court held that employment discrimination class actions, like all other class actions, must comply with the requirements of typicality and commonality. The Court found that because adjudication of Falcon's claim of discrimination in promotion on the basis of his Mexican-American origin would not require decisions of common questions of law or fact regarding discrimination against Mexican-Americans in hiring, Falcon could not bring a class action on behalf of both groups. As a result of the *Falcon* decision, the fact that a plaintiff is a member of an identifiable class of persons of the same race, sex, or national origin is in itself no longer sufficient to establish standing to litigate on behalf of the class all possible discrimination claims against their common employer. Discrimination on the basis of sex, race or national origin is no longer by its nature perceived as class discrimination.

Although the effect of the *Falcon* decision was to limit across-the-board attacks on a company's employment policies, the Court did not foreclose all such actions. In footnote 15, which has been the basis for carving out exceptions to the decision, the Court held that

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decision making practices.

Id. at 159, n.5. In his opinion in which he concurred in part and dissented in part Chief Justice Burger inferred that an allegation that the same person made both the hiring decisions and the promotion decisions is sufficient to satisfy the typicality and commonality requirements under Rule 23. *Id.* at 162.

In certifying a class of all blacks presently employed by defendant or who have at any time since October 21, 1979 been employed or sought employment with defendant or who may in the future seek employment by defendant, the Court noted that plaintiff "at this stage" had presented evidence suggesting that Gary Shipp had been responsible for or had at least played a major role in all hiring and promotion decisions during the relevant time period. Accordingly, whether Shipp is prejudiced against blacks and whether this prejudice is reflected uniformly in the Bank's employment practices provided the common question to satisfy the typicality and commonality requirements. The Court noted in its certification order that between October 21, 1979 and June 1982 the class consisted of over one hundred black applicants and fifteen black employees, with subsequent additions to these numbers after June 1982 when the statistics were closed for the purposes of the certification hearing.

If class certification ordered at the initial stage of litigation is later found to have been improvident, the Court may decertify, subclassify or amend the classification when the merits of the case are heard. Fed. R. Civ. P. 23(c); *Valentino v. United States Postal Service*, 674 F.2d 56, 66 (D.C. Cir. 1982); *Eggleston v. Chicago Journeymen Plumbers*, 657 F.2d 890, 896 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982). Upon hearing trial testimony on the scope of Gary Shipp's participation in hiring and promotion decisions, the Court has determined that there is not a common question of law or fact between the unsuccessful black applicants and those blacks employed by the Bank. The evidence showed that although Shipp has final authority over all personnel deci-

sions, his function is largely one of reviewing decisions made by those department supervisors reporting to him. The evidence showed that supervisors make hiring and promotion decisions for their departments, subject to Shipp's approval, and that as a general rule he defers to their judgment. Supervisors also make the initial employee evaluation upon which raises are calculated, subject to approval by the three member Salary Review Committee. Shipp is a member of the committee but does not have a disproportionate impact on the committee's decisions.

Accordingly, after hearing more evidence on the scope of Shipp's participation in the wide range of personnel decisions made by the Bank, the Court finds that Shipp did not make all hiring decisions and all subsequent decisions as to the employees' terms and conditions of employment. Therefore, within the discretion under Rule 23 to alter the class certification, the Court finds that two distinct classes exist: (1) those blacks who have applied to the Bank for employment since October 21, 1979 but were not hired and those blacks applying in the future; and (2) those blacks who have been employed by the Bank since October 21, 1979.

By separating the class into two groups, the Court has created a group of applicants containing more than one hundred persons and a group of employees, which consists of approximately fifteen persons. The Court finds that the class of blacks employed by the defendant since October 21, 1979 does not meet the numerosity requirements of Rule 23. A prerequisite for a class action is that the class is "so numerous that joinder of all members is impracticable." Rule 23(a)(1). No arbitrary number has been established to satisfy the requirement, because the issue is practicability of joinder, not the interested number of persons per se. Practicability of joinder depends on the size of the class, their geographic dispersion, the ease of identifying the members and determining their addresses and the ease of making service

on them if joined. *Garcia v. Gloor*, 618 F.2d 264, 267 (5th Cir. 1980). The Court finds that a class of approximately fifteen persons is not so numerous that joinder would be impracticable, particularly in light of the fact that at least seven persons, in addition to the plaintiff, live in this area because they are currently employed by the Bank.

Further, although plaintiff made allegations of discrimination by defendant in hiring, compensation, initial placement, promotions, terminations, departmental segregation, leave policy and other terms and conditions of employment, there is little or no evidence of discrimination in these categories. No evidence was presented concerning discrimination in leave policy or termination. The evidence showed that in addition to plaintiff, only one black, Sylvia Harden, had applied for promotions which were given to whites. Harden testified at trial that she did not allege that she has been discriminated against on that basis. Three blacks employed by defendant, Harden, Paula Hill and Jacqueline Dancer, testified that they did not claim any discrimination by defendant on the basis of race. Accordingly, because of the small number of black employees and testimony by three of the group that they do not allege discrimination, the Court finds that claims by defendant's black employees are a small and distinct group of individual claims which may not be brought as a class action. There is nothing in the record to show that any black employed by defendant since October 21, 1979 has foregone filing suit against the defendant because of the existence of this action. However, equity requires that no black employee within the relevant time period be barred from filing suit alleging individual claims as a result of reliance on the pending class action. Accordingly, the Court orders that the statute of limitations be tolled from October 21, 1981 to the date of entry of judgment for individual discrimination claims by black employees, upon proof that the employee had actual notice of the filing of the class action

suit and failed to file an individual discrimination claim in reliance on the class claim.

The Court has found that plaintiff's claims are not typical of the claims of the class of unsuccessful black applicants. Accordingly, pursuant to Fed. R. Civ. P. 23, plaintiff is not a proper class representative. Having made such a finding, the Court may now proceed in one of two ways. The Court may appoint a new class representative. *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983). In the alternative, the Court may consider the evidence presented at trial relative to discrimination in hiring and determine the merits of the claim. *See General Telephone v. Falcon*, *supra* at 163 (opinion of Chief Justice Burger, concurring in part and dissenting in part).

The Court finds that plaintiff proceeded zealously on behalf of the group of blacks who applied for employment by the Bank, as well as those blacks employed by the Bank and, accordingly, chooses the second course of action. After considering the statistical evidence introduced by plaintiff regarding the hiring of blacks by defendant, the Court finds that they do not present a prima facie case of race discrimination. Blacks represent 13.1% of defendant's non-exempt employees and 11.8% of the population of Tarrant County, 10.2% of the population of the Fort Worth Metropolitan area and 22.8% of the population of Fort Worth. Accordingly, the Court finds that no discrimination against blacks as a class has been proved on the basis of defendant's hiring practices. *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

10. Any conclusion of law which should be a finding of fact is hereby made a finding of fact.

Signed this 20th day of November, 1984.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

(Title Omitted in Printing)

JUDGMENT

This action came on for trial before the Court, Honorable Eldon B. Mahon, U.S. District Judge, sitting without a jury. The issues having been duly tried, and the Court having rendered an opinion, it is ORDERED and ADJUDGED that Plaintiff Clara Watson take nothing and that the action be dismissed on the merits. The parties are to bear their own costs of action.

Entered this 20th day of November, 1984.

/s/ Eldon B. Mahon
ELDON B. MAHON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1074

CLARA WATSON,
Plaintiff-Appellant,
v.

FORT WORTH BANK & TRUST,
Defendant-Appellee.

Filed August 27, 1986

Before: Irving L. Goldberg, Carolyn Dineen Randall, and Sam D. Johnson, Circuit Judges.

Opinion by Judge Sam D. Johnson;
Dissent by Judge Irving L. Goldberg

Appeal from the United States District Court
for the Northern District of Texas
Eldon B. Mahon, District Judge, Presiding

OPINION

SAM D. JOHNSON, Circuit Judge:

Plaintiff-appellant Clara Watson appeals from the district court's judgment in favor of defendant-appellee Fort Worth Bank & Trust in Watson's Title VII and Civil Rights action alleging discrimination on the basis of race. 42 U.S.C. § 2000e *et seq*; 42 U.S.C. § 1981. For

the following reasons, this Court affirms the judgment of the district court in part, but vacates the district court's judgment regarding the applicant class claims.

I. *FACTS*

Fort Worth Bank & Trust ("the Bank") hired Watson in August of 1973 as a proof operator. The Bank promoted Watson to the position of teller trainee approximately two years later. After a two to three month training period, Watson became a teller in the Bank's motor bank in January of 1976. Subsequently, the Bank transferred Watson to the Bank's main lobby and later promoted Watson to the position of commercial teller on February 2, 1980.

Over the course of the next year, Watson unsuccessfully applied for four different promotions. First, in February of 1980, Watson unsuccessfully applied for promotion to the position of supervisor of tellers, which became vacant due to the resignation of assistant cashier Brian England. Watson; Richard Burt, a white male who was then the supervisor of the bookkeeping department; Gail Levitt, a white female who was then supervisor of motor bank tellers; and Pat Cullar, a white female who was then a commercial teller, all applied for the position. Gary Shipp, senior vice president and cashier at the Bank since 1977 and the person to whom the supervisor of tellers reported, selected Richard Burt as England's replacement.[1] Second, Watson unsuccessfully applied for promotion to the position of motor bank teller supervisor. Watson, Pat Cullar, and four or five other persons applied for the position vacated by Gail

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[1] The Bank hired Burt in May of 1976 as a part time motor bank teller. At the time, Burt was a full time student. Burt became a full time employee in January of 1977, working first in the general ledger department for one year, then as a credit analyst for six months, and finally as supervisor of the bookkeeping department from 1979 until his promotion to supervisor of tellers. Bu[illegible] obtained a bachelor's degree in banking and finance in May of 1980.

Levitt. Pt Cullar received the promotion.[2] Third, Watson unsuccessfully applied a second time for the position of lobby teller supervisor when the Bank again promoted Burt, Watson, Cullar, Sylvia Hardin, a black female commercial teller, and Patsy Weatherly, a white female who was then supervisor of the proof department, all applied for the position. But chose Cullar. Fourth, as a result of Cullar's second promotion, the position of motor bank teller supervisor again became vacant, and Watson unsucessfully applied for the position. Other applicants included Hardin and Kevin Brown, a white male teller in the motor bank. Based on Cullar's recommendation, Burt selected Brown for the position.[3]

Watson took a leave of absence from work in January 1981 in order to undergo foot surgery. She applied for the last two described promotions while on sick leave. Watson did not return to work after January of 1981, and she subsequently resigned in August of 1981.

II. *PROCEDURAL HISTORY*

After exhausting her administrative remedies, Watson timely filed the instant suit on October 21, 1981, alleging that the Bank discriminated against her and other similarly situated persons on the basis of race in violation of

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[2] Both Watson and Cullar were commercial tellers when the p si-tion of motor bank teller supervisor became vacant. Watson had six and one-half years' experience with the Bank while Cullar had worked for the Bank for only two and one-half years. Cullar, however, had almost eighteen years of experience in banking at another bank, with more than sixteen years of experience in the teller areas. Cullar and Watson scored comparably on the Bank's 104 point job performance evaluation: Watson scored 70 and Cullar scored 72.

[3] The Bank hired Brown as a part time teller in October of 1979. He became a full time teller in May of 1980 and served as Cullar's assistant for six months. His previous experience included seven months as a sales person at a department store and approximately four years' experience at Six Flags Over Texas, which included some work supervising teenage seasonal employees.

42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[4]

After conducting an evidentiary hearing on the class certification issue, the district court certified a class consisting of "blacks who applied to or were employed by defendant on or after October 21, 1979 or who may submit employment applications to defendant in the future." Subsequently, the district court decertified the broad class of employees and applicants because the district court concluded, in light of all the evidence at trial, that there was not "a common question of law or fact between the unsuccessful black applicants and those blacks employed by the Bank." The district court then split the class into two distinct classes consisting of (1) black applicants and (2) black employees. The district court further found that the class of black employees did not meet the numerosity requirement of Rule 23(a) and decertified the employee class.

On the merits, the district court concluded first that although Watson demonstrated a prima facie case of discrimination, she failed to demonstrate that the Bank's articulated reasons for failing to promote her were pretextual. The district court then addressed the claims of the applicant class holding that Watson's statistical evidence failed to present a prima facie case of discrimination in hiring because the percentage of blacks in the Bank's work force mirrored the percentage of blacks in Tarrant County, Texas, and the Fort Worth metropolitan area, citing *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L. Ed. 2d 768 (1977).

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[4] In this Circuit, specific consideration of an alternate claim under § 1981 is necessary only if its violation is made out on grounds different from those available under Title VII. Watson does not assert such differences, and the elements of a substantive claim of employment discrimination under § 1981 parallel the elements of a Title VII claim. *Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1041 n.2 (5th Cir. 1984); *see Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982).

On appeal, Watson challenges the district court's decertification of the broad class composed of both applicants and employees and further challenges the district court's resolution of both her individual claim and the claims of the applicant class. For the following reasons, this Court affirms the judgment of the district court in part, but vacates the district court's judgment regarding the applicant class claims, remanding solely for the district court to dismiss the applicant class claims without prejudice.

III. *CLASS CERTIFICATION*

A district court's class certification order is reviewed under an abuse of discretion standard. *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). Even after initial certification, a district court may determine that certification was improvidently granted, and a district court remains free to decertify, subclassify or modify the class certification previously entered. Fed. R. Civ. P. 34(c)(1); *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L. Ed. 2d 740 (1982).

Prior to the Supreme Court's decision in *Falcon*, this Court permitted a plaintiff alleging race discrimination to assert an "'across the board' attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination." 457 U.S. at 152; 102 S.Ct. at 2367. *See e.g., Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969). In *Falcon*, the Supreme Court curtailed that practice holding that it was error for the district court in that case to certify a class of both applicants and employees because the district court erroneously presumed, without a specific presentation, that the requirements of Fed. R. Civ. P. 23 were met. "[W]e reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court

is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 457 U.S. at 161, 102 S.Ct. at 2372.[5]

Falcon, however, does not foreclose all classes composed of applicants and employees. 457 U.S. at 159 n.15; 102 S.Ct. at 2371 n.15.[6] *See, e.g., Vuyanich v. Republic National Bank*, 723 F.2d 1195, 1199-1200, *rehearing denied*, 736 F.2d 160 (5th Cir.), *cert. denied*, 105 S.Ct. 567 (1984); *Richardson v. Byrd*, 709 F.2d 1016, 1019-20 (5th Cir.), *cert. denied*, 464 U.S. 1009 (1983). The "entirely subjective decisionmaking process" articulated in Footnote 15 presents one factual situation in which a putative class might meet the requirements of Rule

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[5] Federal Rule of Civil Procedure 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Courts commonly refer to these criteria as the requirements of numerosity, commonality, typicality, and adequacy of representation.

In addition, a class action must meet one of the provisions of Rule 23(b). In this case, the district court certified the class as a Rule 23(b)(2) class finding that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Fed. R. Civ. P. 23(b)(2).

[6] In Footnote 15, the Supreme Court stated:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

23(a). Chief Justice Berger, in his concurring and dissenting opinion, suggests another: Rule 23(a) might be met upon a showing that "the same person or persons who made the challenged decisions were motivated by prejudice against [the protected class], and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote [members of the class]." 457 U.S. at 162 & n., 102 S.Ct. at 2373 & n.

In the instant case, the district court relied on the Chief Justice's opinion to certify a class composed of both applicants and employees. After the evidentiary hearing, the district court found that a single individual, Gary Shipp, was responsible for both hiring and promotion decisions. That fact, the district court reasoned, satisfied the commonality requirement for a class composed of both applicants and employees. After the trial on the merits, however, the district court concluded that Shipp's role was more limited. The evidence at trial demonstrated that a limited group of white department supervisors made all hiring and promotion decisions, as well as employee evaluations used to compute compensation, and that upper management routinely approved those decisions. As a result, the district court concluded that Watson failed to show the existence of common questions between the applicants' and employees' claims because the same *individual* was not responsible for both hiring and promotion decisions.

Watson asserts the district court erred because the commonality requirement may be satisfied by a showing that the same *persons* make both types of decisions. Assuming, *arguendo*, that Watson is correct, this Court's inquiry does not end with that conclusion. We cannot conclude that certification of a class of both employees and applicants is mandated merely because common questions exist.[7] Rather, the other factors enunciated in Rule 23(a) also must be considered.

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[7] The issue in the instant case is not whether it was correct for the district court to initially certify a broad class of both applicants

Thus, assuming a common question was presented in the instant case, *e.g.*, whether the same limited group of white supervisors discriminated in both hiring and promotions, that common question was not in fact a central feature in the actual proof presented at trial. The applicant class claims relied primarily on applicant flow statistics. In contrast, the proof asserted in support of the promotions claims focused on statistical evidence of the Bank's treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices. Consequently, the actual proof presented demonstrates that Watson's promotion claim was not typical of the applicant class claims, and she was not an adequate class representative.[8]

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and employees or whether this Court would have affirmed that certification on appeal. This Court expressly declines to address the question whether a class of applicants and employees would have been permissible under the facts of this case. Rather, the sole question presented is whether the facts of this case *mandate* a class of both applicants and employees. This Court concludes that the facts of the instant case do not mandate such class treatment.

[8] As the Supreme Court noted in *Falcon*, the commonality, typicality, and adequacy of representation requirements of Rule 23(a) tend to merge. All focus on whether a class action is an economical method of adjudicating the claims and whether the plaintiff's claims and class claims are "so interrelated that the interests of the class members will be fairly and adequately protected in their absence." 457 U.S. at 157 & n.13; 102 S.Ct. at 2370 & n.13. In holding that typicality cannot be presumed absent a specific showing identifying common questions of law or fact, the Supreme Court focused on the evidentiary approaches necessary to sustain the individual as compared to the class claims. 457 U.S. at 159, 102 S.Ct. at 2371. *See also Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 334 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (although claims of individual and class wide discriminatory termination overlapped on several important pieces of proof with claims of discrimination in promotions, the district court properly denied broad class certification because promotions claims raised significant issues of proof separate from those evidentiary issues implicated by the termination claims).

This Court concludes that it was not an abuse of discretion for the district court to decertify the class because, as a practical matter, the "maintenance of [Watson's] action as a class action did not advance 'the efficiency and economy of litigation which is a principal purpose of the procedure.'"[9] *Falcon*, 457 U.S. at 159, 102 S.Ct. at 2371 (quoting *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 766, 38 L. Ed. 2d 713 (1974)). As the actual proof at trial demonstrated, the hiring and promotion claims might well have been tried separately, *id.*, and it was not an abuse of discretion to so proceed.[10]

IV. *WATSON'S INDIVIDUAL CLAIM OF DISCRIMINATION*

The district court analyzed Watson's individual claim of discrimination under the test enunciated in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed. 2d 207 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this test, the district court ultimately concluded that Watson was not the victim of racial discrimination.

As an initial matter, Watson asserts that the district court erred in not applying disparate impact analysis to

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[9] Contrary to the assertion of the dissent, this Court does not hold that the actual proof on behalf of the applicant and employee claims must be *identical* in order to maintain a class action composed of both applicant and employee claims. Rather, we hold only that a class action should advance the efficiency and economy of the litigation and the complete failure of the actual proof to overlap to any significant degree leads this Court to conclude that it was not an abuse of discretion to separately try the employee and applicant claims.

[10] Although Watson raises the point only in her reply brief, this Court concludes that the district court did not abuse its discretion in determining that the employee class failed to meet the numerosity requirement of Rule 23(a).

her claims of discrimination in promotion.[11] Contrary to Watson's position on appeal, this Court's recent precedent establishes that a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model. *See, e.g., Lewis v. NLRB*, 750 F.2d 1266, 1271 & n.3 (5th Cir. 1985); *Carroll v. Sears, Roebuck & Company*, 708 F.2d 183, 188 (5th Cir. 1983); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 620 (5th Cir. 1983); *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795, 800 (5th Cir. 1982).[12] Having de-

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[11] A plaintiff may bring a Title VII action under either the disparate treatment theory or disparate impact theory of recovery. Under the disparate treatment theory, a class must prove the existence of a pattern and practice of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L. Ed. 2d 396 (1977). A disparate treatment theory requires proof of discriminatory intent, which must be established by either direct or circumstantial evidence. In contrast, the disparate impact theory does not require proof of discriminatory intent. Rather, the plaintiff must show that a facially neutral employment practice has the result of producing a significant adverse impact on one race. *Id.; Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L. Ed. 2d 786 (1977); *Walls v. Mississippi State Department of Public Welfare*, 730 F.2d 306, 315, 321-22 (5th Cir. 1984); *Page*, 726 F.2d at 1045.

[12] *See also Walls*, 730 F.2d at 321-22; *Vuyanich*, 723 F.2d at 1201-02; *Pegues v. Mississippi State Employment Service*, 699 F.2d 760, 765 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982).

But see Page, 726 F.2d at 1046 (district court did not err in evaluating subjective promotional system under disparate impact model). Watson relies heavily on *Page* for the proposition that disparate impact analysis is appropriate in the instant case. As stated by this Court in *Carpenter*, "Were this a case of first impression in this court, we would likewise have concluded that the other [challenged practices] . . . fell clearly under the disparate impact model. . . . since they 'limit, segregate, or classify' employees in a manner that 'would deprive or tend to deprive any individual of employment opportunities. . .' because of race. . . ." 706 F.2d at

cided to decertify the class, the district court then properly treated Watson's claim as an individual disparate treatment claim, and the court correctly analyzed this claim under the *Green* model.

Both Watson and the dissent urge that we analyze this case under a different model. Given our approval of the district court's decision to decertify the class, however, this suggestion is unavailing.

This is not to say, however, that the plethora of statistics which Watson introduced at trial, and upon which the dissent so heavily relies, are irrelevant in an individual disparate treatment case. Not only may the statistics be relevant at the initial stage of the litigation in establishing a prima facie case of discrimination,[13] but

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620. Nevertheless, this is not a case of first impression, and this Court is constrained by *Pouncy* and its progeny to apply disparate treatment analysis to Watson's claims.

[13] Other courts have held that an individual Title VII plaintiff may establish a prima facie case of racial discrimination by the use of statistics alone. *See, e.g., Davis v. Califano*, 613 F.2d 957, 962 (D.C. Cir. 1980) ("[S]tatistical evidence may establish a *prima facie* case of employment discrimination in an individual case."); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 (9th Cir. 1980) (following *Davis*); *Christner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1259 & n.7 (6th Cir. 1981) (following *Davis*). *Cf. Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1131 (11th Cir. 1984) ("Statistics can be relevant and important in an individual case . . . . But statistics alone cannot make a case of individual disparate treatment."). We need not decide this issue since Watson established a prima facie case under *Green* without relying exclusively on statistical data. Moreover, statistics are indisputably relevant in an individual Title VII case at the third stage of the litigation: when the plaintiff attempts to establish pretext. *See, e.g., Green*, 411 U.S. at 804-05. Thus, in this case, the statistical data which Watson presented remained pertinent even though the class was eventually decertified. There is no indication in the record, nor is there any suggestion—either by Watson or the dissent—that the district court neglected to consider the statistical evidence presented by Watson in terms of evaluating the credibility of the Bank's proffered explanations for its promotion decisions.

they are also relevant at the third stage of analysis when the plaintiff is attempting to prove that the reasons proffered by the defendant for its action are either unworthy of credence or mere pretexts for discrimination. *See, e.g., Green*, 411 U.S. at 804-05. In this case, the district court did not decide to decertify the class until after the trial had been completed and all the statistical evidence had been introduced. Much of the evidence, of course, was related primarily to the plaintiff's class claims. Even once the class claims dropped from the suit, however, the data retained relevance to the plaintiff's individual claim since it continued to bear on the veracity of the defendant's explanations for its promotion decisions.[14]

After hearing all the evidence, including the statistical evidence, the district court concluded that the reasons offered by the Bank were not pretextual. We judge this holding under the clearly erroneous standard. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). We conclude that the district court's finding that the Bank's explanations for its action were not pretexts for discrimination is not clearly erroneous. The district court's findings will not be set aside unless this Court on the entire evidence is left with the "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L. Ed. 2d 746 (1948). "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, — U.S. —, 105 S.Ct. 1504, 1512, — L. Ed 2d — (1985).

Watson challenges the district court's ultimate finding of no discrimination on three specific grounds: (1) that the district court erroneously relied on the Bank's sub-

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[14] We should also point out that, given our instructions *infra* in Part V, the statistical evidence might also be relevant in any class action brought in the future by the class of applicants.

jectively administered performance evaluations, which Watson arrests were proven to be racially biased, (2) that the district court erroneously relied on a reason not articulated by the Bank for its failure to promote her, and (3) that the district court erroneously considered a series of articulated qualifications for promotion which were inconsistent, contradictory, and therefore incredible.

The district court specifically credited the Bank's assertion that it promoted Burt and Cullar rather than Watson because in all three instances Watson had less experience or supervisory experience than the individual chosen for promotion. Although the district court noted that Burt received excellent performance evaluations and that Cullar's and Watson's ratings were comparable, the district court clearly placed primary emphasis on Burt's and Cullar's experience in finding no discrimination and little emphasis on the employee evaluations. This Court cannot say that the district court's ultimate finding was clearly erroneous.

This Court is more troubled by the Bank's promotion of Brown because Brown clearly had less experience than Watson. The district court noted that Cullar highly recommended Brown for the promotion, relying on his performance as a teller and as her assistant. In addition, the Bank relied on Brown's experience supervising temporary employees at Six Flags Over Texas. Finally, the distict court noted that Watson was on sick leave when the position became vacant and Brown, in contrast, was available immediately. The Bank, however, failed to urge this last reason as a basis for its failure to promote Watson. Disregarding this basis for upholding the district court's decision, the record nevertheless still supports "two permissible views of the evidence." Specifically, even though the reasons articulated for Brown's promotion are somewhat inconsistent with the Bank's articulated reasons for Burt's and Cullar's promotions, the district court clearly credited the Bank's explanation. We do not find

any inconsistency to be so striking as to make the Bank's proffered reasons incredible. Consequently, this Court holds that the finding regarding the Brown promotion is not clearly erroneous.

V. *THE APPLICANT CLASS CLAIMS*

After concluding that Watson was not an adequate representative of the applicant class because her promotion claims were not typical of the applicant claims, the district court nevertheless chose to address the merits of the applicant claims. The district court found that Watson failed to present a prima facie case of race discrimination in hiring because the percentage of blacks in the Bank's work force mirrored the percentage of blacks in the population of Tarrant County and the Fort Worth metropolitan area.

Rather than address the correctness of the district court's reliance on population figures rather than applicant flow data, and we note parenthetically our grave concerns with the district court's approach, *see Payne*, 673 F.2d at 823-24, this Court vacates the judgment of the district court as it relates to the applicant class claims. The case is remanded to the district court to dismiss the applicant claims without prejudice. We note the unfair prejudice that might flow from a determination of the class claims when both the district court and this Court have held that the named plaintiff is not a proper class representative. *Vuyanich*, 723 F.2d at 1200; *Wheeler v. City of Columbus*, 703 F.2d 853, 855 (5th Cir. 1982). *See also Goodman v. Lukens Steel Co.*, 777 F.2d 113, 125 (3d Cir. 1986).[15]

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[15] As did the district court, this Court notes that equity requires that no black applicant within the relevant time period be barred from filing suit alleging individual claims or class claims as a result of reliance on the pending class action. Accordingly, the district court may enter any orders on remand it deems necessary to protect the claims of black applicant class members.

VI. *CONCLUSION*

This Court finds no abuse of discretion in the district court's class decertification decision. In addition, this Court affirms the district court's conclusion that Watson was not the victim of racial discrimination. Finally, this Court vacates the district court's judgment as it relates to the applicant class claims and remands the case to the district court to dismiss those applicant class claims without prejudice. The judgment of the district court is

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED.

IRVING L. GOLDBERG, Circuit Judge, dissenting:

Respectfully, but without equivocation, I dissent.

The majority today continues and worsens this circuit's evisceration of the class action's role in the fight against the scourge of race discrimination. The erosion began with *Vuyanich v. Republic National Bank*,[1] and it grows today with the majority's refusal to certify a class of applicants and employees in the face of common and typical questions of fact and law and unrebutted statistical proof of a class-wide pattern and practice of discrimination. Nothing in Rule 23 or this circuit's interpretation of the rule compels this result.

The class action has been the greatest instrument in enforcing Title VII's promise that invidious race discrimination shall have no role in the workplace. Without the efficiency and economy of this procedural tool, it is safe to say that the injuries of thousands would have remained both undiscovered and unredressed.[2] And yet,

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[1] 723 F.2d 1195, *rehearing denied*, 736 F.2d 160 (5th Cir.), *cert. denied*, 105 S.Ct. 567 (1984).

[2] As one commentator has noted

> [T]he foreclosure of broad class actions decreases a person's ability to bring a title VII suit. An individual can bring an action only if he can find an attorney willing to take his case. A plaintiff suing individually or on behalf of a small class may find it difficult to procure a competent attorney. In title VII cases, the size of an attorney's fee award usually corresponds to the number of plaintiffs involved in the suit. As the number of plaintiffs decreases, so too does the attorney's incentive to handle the case. Thus, a person may find it impossible to bring an individual suit or a narrow class action even when he has a meritorious claim.

Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 626 (1986). Moreover, because of differences in the scope of discovery and burdens of proof, *see* "Individual Claims" *infra*, "the difference between the success and the failure of a valid claim is often the difference between a class action and an in-

in the name of the very efficiency and economy that give the class action its being, the majority disposes of only one individual's claim and forecloses forever proof of a pattern and practice of discrimination by appellee Ft. Worth Bank & Trust (the bank). The applicants must start over from square one,[3] and the employees have no choice but to shoulder a far more onerous evidentiary burden and prosecute their claims one by one by one. This result serves neither efficiency nor economy. More significantly, it disserves Title VII by preventing the court from recognizing and eradicating what is, on the record before us, clearly a pattern and practice of discrimination. The majority has left the substantive norms of Title VII twisting in the cold wind of the Fifth Circuit's Rule 23.

The majority's opinion has at least two readily apparent consequences. First, the opinion would compel a finding that the district court's initial decision to certify the class was an abuse of discretion. This result is apparent because the nature of plaintiff's statistical proof —which the majority deems fatal to typicality—is the same whether one individual or a group of individuals makes the decisions affecting the class. Thus, even if every single decision had been made exclusively by Shipp instead of the white supervisors, this circuit would now refuse to certify the class because the class representa-

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dividual suit." *Id.* at 628; *see also*, Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 38-39 (1982).

[3] Assuming *arguendo* that the applicants and employees must proceed separately in this case, dismissal of the applicant class is inappropriate. The proper course is a remand to the district court for the appointment of a proper class representative. *Satterwhite v. City of Greenville*, 634 F.2d 231 (5th Cir. 1980) (en banc); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 619-620 (5th Cir. 1983).

tive, in the absence of a smoking gun, was forced to rely on separate sets of statistics to prove up intent.[4]

Second, and more important, the majority consigns pattern and practice suits to the dustbin of this circuit's history. Whether from inadvertance or fear of overflowing dockets, this circuit is erecting insurmountable obstacles to the full enforcement of Title VII. This dam threatens to stop the flow of statutory rights and holds the promise of an arid and barren future. The rights, duties, and liabilities that arise from the constitution and statutes flow freely and are not to be impeded by the fear that there will be a flood of cases. We have heard this hue and cry since the days of the constitution's nativity, and it has never stopped our judicial instrumentalities from carrying out their duties. It threatens to do so today.

To the matter directly at hand, this appeal raises two significant issues. The first is whether the district court abused its discretion in bifurcating the class. I believe that it did and would accordingly recertify the class. The second issue, which the majority does not reach, is whether the plaintiff successfully established a prima facie case of class-wide disparate treatment. I would answer this question in the affirmative as well, and hold in addition that the bank failed to rebut appellant's case. Accordingly, I would reverse and remand for appropriate relief.

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[4] While the majority in footnote 7 leaves open the possibility that the district court's initial decision to certify the class would not have been an abuse of discretion, this hope is empty. Once an appellate court declares claims atypical as a matter of law, as the majority has done here, a trial court cannot waive the magic wand of judicial discretion to resurrect the claims' typicality. Moreover, even if the trial court could do so, I think it a sad reflection on our system of justice that the vindication of substantive civil rights can in effect hang on an essentially unreviewable exercise of the trial judge's discretion in refusing to certify a class. *Cf. supra* note 2 and *infra* note 9.

Class Certification

Although "racial discrimination is by definition class discrimination," *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364, 2370 (1982), Rule 23 of the Federal Rules of Civil Procedure nonetheless restricts the degree to which the courts may deploy this simple fact in structuring class actions. "[T]he allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified." *Id.* Accordingly, "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 2372.

Rule 23(a) imposes upon plaintiffs who seek to represent a class the duty to show that:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

These four elements are commonly referred to as the requirements of numerosity, commonality, typicality, and adequacy of representation.[5]

Prior to the Supreme Court's decision in *Falcon*, the majority rule among the circuits, and in this circuit in

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[5] The district court must also find that the class may proceed under subsection b of Rule 23. In this case, as in most Title VII cases, the district court certified the class under 23(b)(2), which requires a finding that

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

particular, *see Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969), generally permitted "across-the-board" attacks on racially discriminatory employment practices merely upon the showing that the plaintiffs and the class they sought to represent were of the same race. *See generally* Note, *Certifying Classes and Subclasses in Title VII Suits*, 99 Harv. L. Rev. 619, 621 (1986). In *Falcon*, however, this approach ran aground on the shoals of commonality, typicality, and adequacy of representation.[6] As the Supreme Court reasoned,

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Id. at 2730.

In *Falcon*, a Mexican-American who had been denied a promotion sought, as in this case, to represent unsuccessful applicants as well in a broad attack on the defendant's employment practices. The district court certified the across-the-board class. The Supreme Court unanimously reversed holding:

> Without any specific presentation identifying the questions of law or fact that were common to the

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[6] *Falcon* recognized that these three requirements tend to merge, as the first two "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Id.* at 2370 n.13.

> claims of [the class representative] and of the members of the class he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants.

Id at 2371.

The Supreme Court, however, did not foreclose completely the possibility that future plaintiffs might succeed in representing an across-the-board class that did not run afoul of Rule 23's prerequisites. In particular, the Court noted:

> Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes.

Id. at 2371 n.15. While footnote 15 of *Falcon* carves out an exception to what could be considered a general ban against certifying a class of both employees and applicants, it more accurately does no more than simply describe one way in which a putative class representative may satisfy Rule 23's requirement that she demonstrate claims and questions of law or fact typical and common to the class.[7] Footnote 15 does not purport to describe the whole universe of common questions of law and fact

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[7] Chief Justice Burger, concurring and dissenting, wrote separately and suggested that a plaintiff may satisfy Rule 23 if she shows that "those who made the hiring decisions are the same persons who determined who was promoted." *Id.* at 2373. The Chief Justice found that the plaintiff in *Falcon* had not met this burden, because "there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent." *Id.*

that are sufficient to unite applicants and employees in a common class. It is not a procedural straight-jacket.

Since *Falcon* at least one decision of this circuit has upheld a class of both applicants and employees.[8] In *Richardson v. Byrd*, 709 F.2d 1016 (5th Cir.), *cert. denied*, 104 S.Ct. 527 (1983), the district court had certified a class consisting of both applicants and employees in a sex discrimination case against a Sheriff's employment practices. In holding that the district court had not erred in certifying the class, this court first noted that *Falcon* had not held "that employees never can represent applicants or that an across-the-board class is never appropriate." *Id.* at 1020. The court then found a "sufficient Rule 23(a) nexus'" in the defendant Sheriff's practice of restricting the assignment of all new female deputies to the jail, a practice which, because the number of positions offered females was smaller than that offered males, necessarily limited the number of females that could then be transferred to more desirable positions in the Sheriff's office. The court found "this connection between employees assigned to the jail and job applicants . . . plainly sufficient to support a class of both." *Id.* at 1020. The court then found that the named plaintiff was a proper class representative because "her claim involved issues of law or fact common to those of applicants and employees assigned to the jail." *Id.*

The court based this finding on plaintiff's showing that the

> Sheriff's employment practices were infected by the "entirely subjective decision-making processes" recognized in *Falcon* as a manifestation of policy whose impact might be sufficient to connect otherwise differently situated persons. The district court found that "[t]he Sheriff's Office had no established senior-

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[8] *See also Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 617 (5th Cir. 1983) (statistical proof of channeling in both custodial and clerical positions set forth issues of law or fact sufficient to justify class of both custodial and clerical employees).

> ity or merit system to determine eligibility for transfer o[r] promotion. Nor did it have written guidelines for promotion or transfers. Instead, promotions and transfers were determined by the supervisors, almost all of whom were male, based largely on subjective factors." This finding demonstrates that "discrimination in its broadest sense" was *not* the only claim common to Richardson and the class she sought to represent. Compare *Wheeler v. City of Columbus*, 703 F.2d 853 (5th Cir. 1983). The concerns of *Falcon* were met when the proof surfaced an accused employment *practice* that adversely affected her and the certified class of employees and applicants. *See Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983) (custodial workers held to be proper class representatives of clerical workers since both were affected by subjective job assignment procedure). The district court did not err in certifying this clases.
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> *Id.*

Faced with Watson's claim to represent a class of applicants and employees at Ft. Worth Bank & Trust, and mindful of the Supreme Court's recent decision in *Falcon*, the district court properly held a full day's evidentiary hearing on plainitff's request.

The court made the following findings as to the common decision-making process affecting applicants and employees:

> Hiring decisions at the Bank are made by the department supervisors, who then submit their decisions to Gary Shipp for formal approval. Shipp rarely vetoes hiring decisions made by those supervisors reporting to him. Shipp personally interviews some applicants that makes the final hiring decisions only for those persons working directly under his supervision. During all periods relevant to this suit, Shipp had final authority over all personnel matters.

> Performance evaluations and promotion decisions are made by the supervisors for those employees under their authority. Since 1978 employees have been given yearly written evaluations which are completed by their supervisors. Salary increases are calculated on the basis of the performance ratings. The supervisors present the evaluations to the Salary Review Committee, which consists of the president or executive vice president of the Bank, the officer in charge of personnel and the senior operations officer. Occasionally a change in the Supervisor's ratings is made, with the concurrence of the full committee. Gary Shipp has been a member of the Salary Review Committee during the entire period relevant to this case. However, he has no more influence over the employee ratings than do the two other committee members.

Memorandum Opinion, Rec. at 398. Thus, the same exclusively white supervisory staff that makes the hiring decisions also makes essentially all decisions affecting employees within their respective departments. The Salary Review Committee represents the only aberration in this process, in that it rather than Shipp has the final say in salary decisions. However, raises hinge on the score an employee receives from her supervisor's evaluation, and these evaluations are rarely disturbed by the reviewers. In effect then, the supervisors for the most part determine an employee's raise as well as her initial rate of compensation.

In its opinion certifying the class, the district court concluded that Watson had presented "exactly that type of evidence" envisioned by *Falcon's* footnote 15. Rec. at 220. This evidence consisted of appellant's showing that Gary Shipp was "responsible for both the hiring and promotion at defendant bank, and has been for over five years. . . . Although defendant asserts that Mr. Shipp does not make the hiring decisions, it is obvious he does

have 'input' into those decisions, with the potential to 'sway' or otherwise influence their outcome through his discussions with the supervisors. The evidence before the Court shows that Mr. Shipp reports directly to the bank officers and has never advanced a black to a position of supervisors." Rec. at 221. The district court therefore certified a class consisting of all blacks who have been employed by or applied for employment with the Bank since October 21, 1979, or who may apply to the bank in the future. The court found that the class of applicants numbered over one hundred and the class of past and current black employees numbered fifteen as of June 1982.

A district court remains free under Rule 23(c)(1) to reassess and alter its certification order at any time prior to a decision on the merits "if, upon fuller development of the facts, the original determination appears unsound." Advisory Committee Comment; *see also Richardson v. Byrd*, *supra*, 709 F.2d at 1019. The district court exercised this freedom in splitting the class and offered the following reasons:

> Upon hearing trial testimony on the scope of Cary Shipp's participation in hiring and promotion decisions, the Court has determined that there is not a common question of law or fact between the unsuccessful black applicants and those blacks employed by the Bank. The evidence showed that although Shipp has final authority over all personnel decisions, his function is largely one of reviewing decisions made by those department supervisors reporting to him. The evidence showed that supervisors make hiring and promotion decisions for their departments, subject to Shipp's approval, and that as a general rule he defers to their judgment. Supervisors also make the initial employee evaluation upon which raises are calculated, subject to approval by the three member Salary Review Committee. Shipp is a member of the

committee but does not have a disproportionate impact on the committee's decisions.

Accordingly, after hearing more evidence on the scope of Shipp's participation in the wide range of personnel decisions made by the Bank, the Court finds that Shipp did not make all hiring decisions and all subsequent decisions as to the employees' terms and conditions of employment. Therefore, within the discretion under Rule 23 to alter the class certification, the Court finds that two distinct classes exist: (1) those blacks who have applied to the Bank for employment since October 21, 1979, but were not hired and those blacks applying in the future; and (2) those blacks who have been employed by the Bank since October 21, 1979.

Rec. at 404.

We review the district court's certification or decertification of a class only for an abuse of discretion, *Richardson v. Byrd*:

> We recognize that those complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that it has before it printed words rather than people. It follows that class certification decisions must be protected by a level of review that accords substantial discretion.

709 F.2d at 1019.[9] I also heed the bank's warning that it is one thing, given the numerous mandatory pre-

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[9] While class certification decisions are protected by a level of review that accords substantial discretion, it would seem that this level of review should not be applied uniformly to all the elements that guide the district judge's decision. For example, the determinations whether there are questions of law or fact common to the class and whether the claims or defenses of the representative parties are typical should be and are relatively straightforward. On these questions, a level of review that accords substantial dis-

requisites that must be satisfied under Rule 23, to find that a district court abused its discretion in certifying a class, and quite another, given the permissive language of Rule 23(b) ("An action *may* be maintained as a class action . . .") (emphasis added), to hold that a district court abused its discretion in failing to certify a class or, as in this case, in decertifying a class.[10]

To show an abuse of discretion, "plaintiffs on appeal must demonstrate facts in the record below that indicate, among other things, the typicality of their claims and their adequacy as representatives of the excluded members of the putative class." *Crawford v. Western Electric Co., Inc., supra*, 614 F.2d at 1305. When plaintiffs have demonstrated these facts or other common questions and issues, appellate courts have rarely hesitated in ordering the certification or recertification of the class. *See, e.g., Samuel v. University of Pittsburgh*, 538 F.2d 991, 997 (3d Cir. 1976) (recertification); *Marcera v. Chinlund*, 595 F.2d 1231, 1237-40 (2d Cir.) (defendant class and expanded plaintiff class certified), *vacated on other grounds sub nom. Lombard v. Marcera*, 442 U.S. 915, 99 S.Ct. 2833 (1979); *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (certification),

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cretion is inappropriate, as the appellate court is equally if not more competent than the trial court to make those determinations. On the other hand, the trial court is generally in a better position to determine whether the class is so numerous that joinder of all members is impracticable. The trial court is also generally in a better position to determine whether the representative parties will fairly and adequately protect the interests of the class, insofar as the determination involves an assessment of the competency of counsel and the zeal of the plaintiff.

[10] *But see Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1304 (5th Cir. 1980) ("Since plaintiffs point to no evidence in the pretrial hearing that would *mandate* a finding by the district judge that plaintiffs were adequate representatives of a class that included other types of employees and nonemployees, we perceive no basis on which to find error or an abuse of discretion.") (emphasis added).

cert. denied, 103 S.Ct. 1772 (1983); *Appleyard v. Wallace*, 754 F.2d 955, 957-59 (11th Cir. 1985); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 448-57 (3d Cir. 1977) (antitrust case), *cert. denied*, 98 S.Ct. 1280 (1978).

In this case the district court plainly erred in concluding that there was no question of law or fact common to both the black applicants and employees.[11] It is abundantly clear from both the record and the district court's opinion that the claims of both applicants and employees were united by common questions of fact. First, the same persons generally made the hiring, evaluation, and promotion decisions for their respective departments. As the district court acknowledged, the "evidence showed that supervisors make hiring *and* promotion decisions for their departments, subject to Shipp's approval, and that as a general rule he defers to their judgment." Rec. at 404 (emphasis added). These managerial arrangements are disturbed only when the three member Salary Review Committee intrudes to approve raises. However, the supervisors who make the hiring and promotion decisions also make the initial employee evaluations on which the raises are strictly based, and these evaluations are seldom disturbed. Thus, the fact that Shipp himself

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[11] The trial judge based this conclusion on his finding that "Shipp did not make all hiring decisions and all subsequent decisions as to the employees' terms and conditions of employment." This conclusion in turn undermined his initial decision that "whether Shipp is prejudiced against blacks and whether this prejudice is reflected uniformly in the Bank's employment practices provided the common question to satisfy the typicality and commonality requirements." Rec. at 403. This initial decision, although correct in itself, had in turn been premised upon a misreading of Chief Justice Burger's opinion in *Falcon*. The trial judge read the Chief Justice's opinion to mean that a common question was present only when the same person made both hiring and promotion decisions. The Chief Justice, however, did not limit himself to a single person, but recognized that common questions presented themselves when the "same person *or persons*" made decisions affecting both applicants and employees. *Falcon*, 102 S.Ct. at 2373 (emphasis added).

does not loom as prominently in the formulation and execution of personnel policy as once thought does little to undermine the pressing presence of a common question of fact concerning the role of the all-white supervisory personnel.

The majority, however, would deny certification because "the actual proof presented demonstrates that Watson's promotion claim was not typical of the applicant class claims." This conclusion rests upon the following assertion:

> Thus, assuming a common question was presented in the instant case, *e.g.*, whether the same limited group of white supervisors discriminated in both hiring and promotions, that common question was not a central feature in the actual proof presented at trial. The applicant class claims relied primarily on applicant flow statistics. *In contrast*, the proof asserted in support of the promotions claims focused on statistical evidence of the Bank's treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices. [emphasis added]

This assertion embodies a profound misunderstanding of what the statistical proof represents.

The majority's assertion is equivalent to nothing more than the following: "The applicant class claims relied on statistics relevant to the applicants, and the employee class claims relied on statistics relevant to employees." I fail to see how this can be fatal to typicality.[12] First,

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[12] While the district court's bifurcated findings on the individual and class claims could be cause for some concern, *Falcon*, 102 S.Ct. at 2371, the fact that individual and class findings can be stated separately cannot possibly serve as a blanket excuse for the denial of class certification. If this were so, Watson would have been an improper representative had she simply sought to represent a class of employees denied promotions.

This concern in *Falcon* arose from the class representative's attempt to prosecute a claim of disparate *treatment* on behalf of

there is no relevant "contrast". Both sets of statistics represent the decisions of the same group of white supervisors. The fact that these white supervisors were not raked over the coals or did not have their motives examined explicitly is irrelevant. Statistical proof allows a plaintiff to infer and prove intent in the expected absence of candid admissions of intent to discriminate. That is what statistical proof is all about. Thus, the decisions of these white supervisors were indeed a central feature in the actual proof presented at trial.

Second, proof of disparate treatment against class of employees and applicants would be impossible without both sets of statistics. If an employer discriminates against black applicants, a plausible inference is that he does not suddenly become a Frederick Douglass to his employees. Each set of statistics bolsters the other and makes possible a finding of a pattern and practice of discrimination. There simply does not exist one all-encompassing statistical measure by which plaintiffs can describe the decisions affecting both applicants and employees. The majority's requirement that the proof be identical for both groups is logically impossible and amounts to a requirement that the named plaintiff suffer injuries identical to those of the class members. However,

> Had the Supreme Court in *Falcon* meant to require identical injuries, it would not have offered examples of ways to establish relationships between employment positions. Nor would there remain a need

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himself and a claim of disparate ——— on behalf of the class. These two claims involve substantially different and unrelated elements of proof. Here, however, Watson advances both her individual and class claims under a theory of disparate treatment. Both of these claims require proof of discriminatory intent, and a finding of intent on either claim will benefit the other. This nexus, together with the presence of a substantial common question of fact, is more than adequate to satisfy the requirement of typicality.

> for an analysis of typicality; the representative plaintiff would either be or not be a member of the class. This approach both undermines the congressional intent underlying Title VII and misconstrues the holding of *Falcon*.

4 N. Newberg, Newberg on Class Actions § 24.13 (2d ed. 1985). The district court erred in decertifying the class, and the majority has chosen to enshrine that error as the law of this circuit.

Falcon's footnote 15 provides an additional basis for certifying the class of applicants and employees. First, as will be clear from the impending discussion of the bank's liability,[13] plaintiff presented "significant proof" that the bank operated under a "general policy of discrimination."[14] Second, "the discrimination manifested

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[13] The Supreme Court noted in *East Texas Motor Freight System Inc. v. Rodriguez*, 97 S.Ct. 1891, 1898 n.12, that

> Where no class has been certified, however, and the class claims remain to be tried, the decision whether the named plaintiffs should represent a class is appropriately made on the full record, including the facts developed at the trial of the plaintiffs' individual claims.

A fortiori, when a class has been certified and the class claims already tried, the certification decision may properly take into account all the evidence presented. As one commentator has noted,

> Courts are permitted to look to the merits of a controversy in order to determine if liability theories or their proof are common to the class. Statistics are frequently presented by class plaintiffs to prove a prima facie case of discrimination, giving rise after the fact to questions common to the class.

4 N. Newberg, Newberg on Class Actions § 24.22 (2d ed. 1985).

[14] In *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 105 S.Ct. 567 (1984), the court decertified a class of applicants and employees and distinguished *Richardson v. Byrd*, *supra*, and *Carpenter v. Stephen F. Austin University*, *supra*, by concluding that plaintiffs in *Vuyanich* had not carried their burden of proving a "general policy of discrimination": "The district court's finding that the Bank relied on two

itself in the same general fashion"—first, as already discussed, through the common bond of the supervisors and Shipp; and second, through "an entirely subjective decisionmaking process." As in *Richardson v. Byrd*, there was no established seniority or merit system and no written guidelines to assist in either hiring or promotion decisions. "Instead, promotions and [hires] were determined by the supervisors, . . . all of whom were [white], based largely on subjective factors." *Id.* at 1020.

As to Watson's ability to represent the class adequately, I find it particularly significant that the district court found, with complete support from the record, that "plaintiff proceeded zealously on behalf of the group of blacks who applied for employment by the Bank, as well as those blacks employed by the Bank." Rec. at 407. Moreover, even though the district court split the employees from the applicants, it passed up the option of appointing a new representative [15] and proceeded to reach the merits of the applicant class' claim on the basis of Watson's zealous representation. Thus, on the record before me, I would hold that the district court abused its

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objective inputs—education and experience—in its necessarily subjective hiring process . . . precludes reliance on this 'general policy of discrimination' exception." *Vuyanich* at 1199-1200. In the case at bar, the employees' education and experience were considered in promotion decisions. For the reasons expressed in the dissent from the denial of rehearing en banc in *Vuyanich*, 736 F.2d 160, 162, I would have serious misgivings were I compelled to follow this aspect of *Vuyanich*. The presence of objective factors in a necessarily subjective hiring process does not render that process any less subjective or any less discriminatory.

I rely therefore on *Richardson v. Byrd*, in which the finding of a general policy of discrimination was premised in part on decisionmaking "based *largely* on subjective factors." 709 F.2d at 1010 (emphasis added). *Byrd* was prior in time to *Vuyanich*, and if this circuit wishes to hoist *Vuyanich* to the highest point on the flagpole of Fifth Circuit jurisprudence, it can do so only through an *en banc* opinion of this circuit.

[15] *See supra* note 3.

discretion in finding a lack of questions of law or fact common to the class, and I would direct the court to recertify the plaintiff class. *Accord Samuel v. University of Pittsburgh*, *supra*, 538 F.2d at 997.[16]

Class Claims

The not particulaly voluminous record in this case does not disclose any substantial anecdotal evidence of racial animus. In fact, Ft. Worth Bank & Trust, a not particularly large bank with approximately eight employees in Ft. Worth, Texas, called at trial several of its black employees, who testified that they had never detected any racial discrimination during the course of their employment with the bank.

The numbers, however, belie the bank's claim that it has not discriminated against the class on the basis of race. When Watson began her career at the bank as a proof operator in August 1973, the bank employed four other blacks on its fifty member work force. Two printed checks in the basement, one was a kitchen attendant, and the last was a porter. The bank has never had a black director or officer, nor has it ever had a black supervisor. Watson's unrebutted statistics indicate that a black who applies for a job at the bank has one-fourth the chance of a white applicant to get the job; should the black be hired, her performance is apt to be evaluated thirty points lower and she is apt to be paid $46.00 per month less than an identically qualified white; and the Bank is likely to advance her to greater responsibili-

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[16] Although I have no basis for concluding that the interests of the named plaintiff and other class members would conflict during the relief stage, should they do so, the district court may employ subclasses pursuant to Fed. R. Civ. P. 23(c)(4)(B). "When the class members are united in interest on the liability issues but have potential conflicts regarding the nature of the relief or the division of a monetary award, the court may avoid the potential conflict by creating subclasses." 1 N. Newberg, Newberg on Class Actions § 3.31 (2d ed. 1985).

ties at a rate of six-tenths of a pay grade per year more slowly than the equally qualified white. Watson herself unsuccessfully sought promotion on four occasions to supervisory positions.

A plaintiff may attempt to bring a cause of action under Title VII, 42 U.S.C. § 2000e *et seq.*, on either the disparate treatment or the disparate impact theory of recovery. At the outset, one is faced with appellant's contention that the district court erred in failing to assess her proof under the disparate impact model. Because plaintiff has succeeded in proving class-wide racial discrimination under the disparate treatment theory, I find it unnecessary to decide whether she could have proceeded under a disparate impact model as well.[17]

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[17] In taking this course, I avoid what appears to be a developing intra- and inter-circuit on the reach of disparate impact analysis. In *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), this court held that "the disparate impact theory applied to an 'overt, clearly identified *nondiscretionary* selection criteri[on] that [was] applied at a single point in a selection process.'" *Id.* at 800 (citations omitted) (emphasis added). Accordingly, the practice of evaluating employees by means of subjective criteria was held not to be "akin to the 'facially neutral employment practices' the disparate impact model was designed to test." *Id.* at 801. *Accord Payne v. Travenol*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 103 S.Ct. 451 (1982); *Pegues v. Mississippi State Employment Service*, 699 F.2d 760 (5th Cir. 1982), *cert. denied*, 104 S.Ct. 482 (1983); *Vuyanich v. Republic National Bank of Dallas*, 723 F.2d at 1202.

On the other hand, in language that is difficult to reconcile with *Pouncy*, the court in *Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir. 1984), held that the disparate impact model could be properly applied to assess "a promotional system which is based upon subjective selection criteria," because "such a system can be facially neutral but yet be discriminatorily applied so that it impacts adversely on one group." *Id.* at 1046. In *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), Judge Tuttle wrote that former Fifth Circuit precedent—with which *Pouncy* was found implicitly to be in conflict—"allow[s] disparate impact challenges to the end result of multi-component selection procedures and to subjective selection procedures." *Id.* at 1523. The *Griffin* court also found

The burden of proof in a class-wide disparate treatment case is well established:

> [T]he Title VII plaintiff must prove the existence of a pattern and practice of race discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). To succeed in a disparate treatment case, a plaintiff must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* at 336 & n.16, 97 S.Ct. at 1855 & n.16. He or she must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Ibid.* In a disparate treatment case discriminatory intent must be established by either direct or circumstantial evidence. *Teamsters, supra*, 431 U.S. at 335 n. 15, 97 S.Ct. at 1854 n. 15; *Wheeler v. City of Columbus, Miss.*, 686 F.2d 1144, 1150 (5th Cir. 1982). . . .
>
> Under the disparate treatment analysis, a Title VII plaintiff may establish a prima facie case of disparate treatment using statistics alone if the statistics show a "gross disparity" in the treatment of

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that the use of disparate impact theory in those circumstances is appropriate in and of itself. *Accord Hawkins v. Bounds*, 752 F.2d 500, 503 (10th Cir. 1985).

This dispute is not insignificant, as it directly affects a plaintiff's burden of proof. In contrast to the plaintiff's burden under the disparate treatment model, plaintiff need not prove discriminatory motive under a disparate impact model, nor does a showing of disparate impact carry with it any implication of discriminatory intent. Thus, while both models assess the "impact" of a defendant's employment practices upon the plaintiff class, this difference in the burden of proof creates a situation in which the threshold at which the impact triggers prima facie liability is significantly less under the disparate impact theory. *Page v. U.S. Industries*, 726 F.2d at 1054 (disparate treatment requires showing of "gross disparity," while a "marked disproportion" suffices to prove disparate impact).

> workers based on discriminatory factors such as race. *Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed. 2d 768 (1977); *Carroll v. Sears Roebuck & Co.*, *supra*, 708 F.2d at 190; *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 451, 74 L.Ed.2d 605 (1982). [*See also Pouncy v. Prudential Insurance Co. of America*, *supra*, 668 F.2d at 802 ("When 'the statistical showing is sufficiently strong in a disparate treatment action, [the] plaintiffs' prima facie case can be made without additional evidence establishing that [the] defendant purposefully treated minorities protected under Title VII less favorably than other persons.' ") (citation omitted).] However, if the statistical disparity shown by the plaintiffs' evidence is insufficient alone to establish a prima facie case of disparate treatment, we have held that a Title VII plaintiff "may get over his or her hurdle by combining statistics with historical, individual, or circumstantial evidence." *Payne*, *supra*, 673 F.2d at 817; *Carroll*, *supra*, 708 F.2d at 190. In order to rebut a prima facie case of disparate treatment, the defendant must discredit the plaintiff's evidence or provide a non-discriminatory explanation for the apparently discriminatory result. *Ibid.*

Page v. U.S. Industries, Inc., 726 F.2d 1038, 1045-46 (5th Cir. 1984). "General assertions of good faith or of hiring only the best applicants, however, are insufficient to meet this burden. If the employer fails to rebut the plaintiff's case, the district court may conclude that Title VII has been violated." *Payne v. Travenol Laboratories, Inc.*, *supra*, 673 F.2d at 817.

The Supreme Court has held that a statistical difference between the treatment accorded a class and that accorded other persons reaches the requisite "gross disparity" when the difference between the expected treat-

ment and the actual treatment is greater than two or three standard deviations. *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17, 97 S.Ct. 1272, 1281 n.17 (1977); *Hazlewood School Dist. v. U.S.*, 433 U.S. 299, 311 n.17, 97 S.Ct. 2736, 2743 n.17 (1977). "The 'standard deviation' is a way to calculate the likelihood that chance is responsible for the difference between a predicted result and an actual result . . . . Statisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations." *Payne v. Travenol*, 673 F.2d at 821 n.32 (providing formula). Thus, when the standard deviation exceeds two and an explanation from the defendant that something other than race explains the disparity is not forthcoming, the defendant will be held liable.

Plaintiffs may also express statistical disparities in terms other than standard deviations. For example, in this case, plaintiff has used a chi-square test to express her findings in terms of the statistical significance of a disparity. A finding that a disparity is statistically significant "at the 0.05 or 0.01 level" means that there is a five percent or one percent probability, respectively, that the disparity is due to chance. For large samples, the test of two or three standard deviations found by the Supreme Court to constitute sufficient proof "is essentially equivalent to a rule requiring significance at a level in the range below 0.05 or 0.01." *Craik v. Minnesota State University Board*, 731 F.2d 465, 476 n.13 (8th Cir. 1984) (quoting Baldus & Cole, *Statistical Proof of Discrimination* § 9.03, at 297 (1980)); *accord Rivera v. City of Wichita Falls*, 665 F.2d 531, 545 n.22 (5th Cir. 1982); *see also Hazlewood School Dist. v. U.S.*, 433 U.S. 299, 318 n.5 (Stevens, J., dissenting).

With these minimal statistical guides in hand, I turn now to plaintiff's statistical evidence. Before I do, however, one cautionary note, sounded before, is in order:

> The bar is reminded that sound statistical analysis is a task both complex and arduous. Indeed, ob-

> taining sound results by these means, results that can withstand informed testing and sifting both as to method and result, is a mission . . . comparable [in] difficulty to arriving at a correct diagnosis of disease.
>
> We are no more statisticians than we are physicians, and counsel who expect of us informed and consistent treatment of such proofs are well advised to proceed as do those who advance knotty medical problems for resolution. Our innate capacity in such matters extends to "the inexorable zero" and perhaps, unevenly, somewhat beyond; but the day is long past—past at least since the Supreme Court's sophisticated analysis in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977)—when we proceed with any confidence toward broad conclusions from crude and incomplete statistics. That everyone who has eaten bread has died may tell us something about bread, but not very much.

Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981) (citation omitted), *cert. denied*, 103 S.Ct. 51 (1982).[18] Accordingly, courts rely heavily on the adversary process to illuminate both the strengths and weaknesses of proffered statistical proof. Where a party chooses to leave facially significant proof essentially unrebutted, that party proceeds at her own peril,

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[18] For an example of the perils of mixing uninformed judicial intuition with statistical analysis, see *Pennsylvania v. Rizzo*, 466 F. Supp. 1219, 1229 (E.D. Pa. 1979), in which the district court found that a small sample size defeated plaintiffs' showing of statistical significance. As pointed out in Baldus & Cole, *supra* § 9.1 (1985 Supp.), however, plaintiff's proof of statistical significance had already taken into account the sample size. "The court, in effect, double counted the influence of the small sample." *Id.* (other cases cited).

for a court will not presume to shoulder her burden of rebuttal.[19]

Working from a stipulated data base, appellant first presented evidence regarding discrimination in hiring. Of 533 white and 144 black applicants during a period of over four years. 16.7% of the whites and 4.2% of the blacks received offers of employment.[20] Plaintiff's expert testified that the disparity was significant at 0.0001, meaning that the probability that this result was due to chance was one in ten thousand. Rec. at 119. My own calculations show that the difference between the actual number of black offers and the expected value is greater than three standard deviations. This pattern repeated itself to a somewhat lesser extent in appellant's analysis of offers to those applicants who specifically requested a

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[19] Except in the area of salary, *see infra* note 30, defendant presented the skimpiest of rebuttal evidence. As witnesses, the bank called four white officers and three black employees, none of whom had any special statistical expertise and who could only testify to, in the case of the whites, the bank's good faith, and, in the case of the blacks, the absence of any noticeable discriminatory climate. None of the black witnesses, however, had any knowledge of the statistical disparities. At best, these witnesses rebut any anecdotal evidence. Where the plaintiff is relying on statistical evidence, however, these witnesses are about as useful as a football in a game of basketball. Moreover, as will be explained in the text, the attempts by defendant's counsel to undermine the statistics on cross-examination are unavailing.

[20] The data are described in the following chart:

OFFERS OF EMPLOYMENT, BY RACE

	WHITES	BLACKS
OFFER	16.7% (89)	4.2% (6)
NO OFFER	83.3% (444)	95.8% (138)
TOTAL	100.0% (533)	100.0% (144)

Plaintiff's Exhibit (hereafter "P-x") 10.

teller position [21] (significant at 0.01) or a clerical position [22] (significant at 0.05). In addition, appellant tested to see whether certain cycles in the bank's hiring period, during which the bank's hiring needs fluctuated, could account for the observed disparity. Appellant looked for the possibility that blacks tended to apply in greater numbers when the bank's hiring needs were less. However, the data indicate that blacks and whites did not apply at significantly different times vis-a-vis the bank's hiring cycle.[23]

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[21] OFFERS TO TELLER APPLICANTS, BY RACE

	WHITES	BLACKS
OFFER	20.1% (32)	5.3% (6)
NO OFFER	79.9% (127)	94.7% (54)
TOTAL	100.0% (159)	100.0% (57)

P-x 13.

[22] OFFERS TO CLERICAL APPLICANTS, BY RACE

	WHITES	BLACKS
OFFER	15.2% (30)	4.8% (3)
NO OFFER	84.8% (168)	95.2% (60)
TOTAL	100.0% (198)	100.0% (63)

P-x 17.

[23] The data are summarized in the following table and cover nine six-month periods:

APPLICANTS, BY RACE, IN DIFFERENT HIRING PERIODS

	WHITES	BLACKS
PERIODS DURING WHICH LESS THAN 10% OF APPLICANTS HIRED	48.6% (259)	52.8% (76)
PERIODS IN WHICH MORE THAN 10% OF APPLICANTS HIRED	51.4% (274)	47.2% (68)
TOTAL	100.0% (533)	100.0% (144)

The chi-square probabilit yis 0.37.

P-x 22.

The district court, for reasons unarticulated in its opinion, completely ignored these data. Instead, it held as follows:

> After considering the statistical evidence introduced by plaintiffs regarding the hiring of blacks by defendant, the Court finds that they do not present a prima facie case of race discrimination. Blacks represent 13.1% of defendant's non-exempt employees and 11.8% of the population of Tarrant County, 10.2% of the population of the Fort Worth Metropolitan area and 22.8% of the population of Fort Worth. Accordingly, the Court finds that no discrimination against blacks as a class has been proved on the basis of defendant's hiring practices.

Rec. at 407.

As a finding of fact, the district court's ultimate finding on the existence of discrimination may not be overturned unless clearly erroneous. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 1788 (1982). A finding of fact is clearly erroneous if the reviewing court is left with "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

I believe it unnecessary to decide whether the conclusion drawn by the district court from the population data is clearly erroneous, because I would agree with appellant that the district court erred as a matter of law in working from the population figures rather than the applicant flow data. Defendant argues correctly that population figures are preferable when the applicant flow data is shown to be significantly flawed. *Payne v. Travenol*, 673 F.2d at 823. However, absent significant flaws in the applicant flow data, these data are far more relevant than general population data to an analysis of an employer's hiring practices. *Id.* at 823-24; *see also Hazelwood*, 97 S.Ct. at 2742 n.13 (applicant flow data "very relevant").

The bank's only attack on the applicant flow data is a claim that the data fail to take into account either the applicants' qualifications or the possibility that duplicative applications skew the data base. Assuming *arguendo* that the bank's non-exempt positions do require minimal qualifications—a point on which the defendant offered no evidence [24]—the bank nonetheless suggested no reason to assume that these qualifications were unevenly distributed between blacks and whites. Absent proof to the contrary, courts should decline to assume that blacks and whites do not possess the relevant qualifications in equal proportions. *Payne v. Travenol*, 673 F.2d at 822; *De Medina v. Reinhardt*, 686 F.2d 997, 1008 (D.C. Cir. 1982). The same argument applies with equal force to the bank's contention regarding duplicate submissions.[25]

In the clear and unshaded light of appellant's statistical evidence, I would conclude that the district court's conclusion that appellant failed to make out a prima facie case of discrimination in hiring is clearly erroneous. Because the bank wholly failed to rebut appellant's proof, I conclude that the bank has discriminated against the class on the basis of race in its hiring.

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[24] At one point in his testimony, Shipp asserted that, based on his recollection of the applicant flow, "basically whites do generally have more previous experience" than blacks. Rec. Vol. V. at 43. However, he had not preserved the data on which this recollection was based and I would therefore find it unworthy of credence; it amounts to little more than an unacceptable "[g]eneral assertion[] of good faith or of hiring only the best applicants." *Payne v. Travenol, supra*, 673 F.2d at 817.

[25] The bank also submitted its own analysis of the applicant flow data which was restricted to applications received within fourteen days of thirty-five hires. This analysis showed that since October 21, 1979, 63 blacks and 108 nonblacks had applied for the 35 positions, and that 8% of the blacks and 28% of the non-blacks were hired. As appellant's expert showed, however, these data still cut in appellant's favor, as the disparity was statistically significant at 0.01. Defendant's Exhibit 2; Rec. Vol. V at 132-33.

I would conclude as well that the bank has discriminated on the basis of race against the employee members of the class. By far the most compelling evidence on this point—and one that also went unrebutted—concerns the disparate treatment accorded the class in the evaluation process.[26] Over a period covering four annual evaluations, blacks rated an average of eleven to fifteen points lower than their non-black co-workers. These differences are statistically significant from 0.05 to 0.001.[27] In order

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[26] Each supervisor rates the employees under his or her supervision in twelve categories on a scale from zero to seven, eight, or ten. The categories are: (1) Accuracy of work; (2) Alertness; (3) Personal Appearance; (4) Supervisor-worker relations; (5) Quantity of Work; (6) Physical Fitness; (7) Attendance; (8) Dependability; (9) Stability ("The ability to withstand pressure and remain calm in most situations"); (10) Drive ("Ambition"); (11) Friendliness and Courtesy; and (12) Job Knowledge. Plaintiff's Exhibit 4.

Few of these categories have much objective content. For example, "personal appearance," "drive," and "friendliness and courtesy" are clearly subjective on their face. While "Quantity of Work" could lend itself to objective measurement, the rating system itself is also subjective: 0-1, "does not meet minimum requirement"; 2-3, "does just enough to get by"; 4, "volume of work is satisfactory"; 5-6, "very industrious does more than is required"; 7-8, "superior work production record." This type of subjective measurement lends itself to discriminatory bias, be it conscious or unconscious.

[27] The data are set out in the following table:

MEAN EVALUATIONS, BY RACE, DURING PERIOD OF CLASS

	NON-BLACKS	BLACKS
FIRST EVALUATION	78.0	***63.0
SECOND EVALUATION	82.8	**69.2
THIRD EVALUATION	84.6	**73.9
FOURTH EVALUATION	85.9	*74.7

* —Statistically significant at .05

** —Statistically significant at .01

*** —Statistically significant at .001

P-x 26.

to see whether factors other than race accounted for these disparities, appellant presented a multiple regression analysis of the data, controlling for the employees' prior experience and initial grade placement at the time of hire. This analysis showed a coefficient for race of —34.37 on the first evaluation and —39.31 on the second evaluation, which means that, after controlling for the effects of experience and grade at hire, blacks scored 34.37 and 39.91 points below non-blacks on the first and second evaluations, respectively, during the period of the class. Both coefficients are significant at 0.001.[28]

Appellant also analyzed the bank's promotions and compensation practices as they affected non-exempt employees. Blacks averaged consistently less across the board.[29] Because the presentation of raw averages alone

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[28] In tabular form, the results are as follows:

STATISTICAL REGRESSIONS FOR EMPLOYEE EVALUATIONS, BY RACE

DEPENDENT VARIABLE	CONTROLLED VARIABLES	COEFFICIENT FOR RACE
FIRST EVALUATION	(A) EXPERIENCE AT HIRE	—34.37
	(B) GRADE AT HIRE	
SECOND EVALUATION	(A) AND (B)	—39.91

P-x 28.

[29] The data are summarized in the following table:

PROMOTIONS AND COMPENSATION, BY RACE

	NON-BLACKS	BLACKS
AVERAGE ANNUAL INCREACE IN GRADE	.53	.18
AVERAGE ANNUAL INCREASE IN SALARY	14.9%	12.0%
AVERAGE FINAL GRADE	5.29	4.13
AVERAGE FINAL SALARY/MONTH	$917.15	$861.47

P-x 29.

is generally not considered probative of disparate treatment, *see Pouncy v. Prudential Insurance Co. of America*, *supra*, 668 F.2d at 802-03, appellant conducted another multiple regression analysis to control for various factors—listed in note 29 below—that might have affected the averages. This analysis again reflected significant disparate treatment of blacks, revealing a disparity in salary of $45.98 per month.[30] This latter figure was statistically significant at .05, which appellant's expert characterized as "compelling" and "actually kind of remarkable, given how much went into that equation and

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[30] These analyses are summarized in the following table:

PROMOTION AND COMPENSATION REGRESSIONS

DEPENDENT VARIABLE	CONTROLLED VARIABLES	COEFFICIENT FOR RACE
AVERAGE ANNUAL INCREASE IN GRADE	(A) EDUCATION (B) FIRST GRADE DURING CLASS PERIOD	—.6***
FINAL GRADE	EDUCATION	—1.22***
FINAL GRADE	EXPERIENCE AT FINAL DATE	—1.21***
FINAL GRADE	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION	—1.38***
FINAL SALARY	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION (D) SECOND EVALUATION (E) MIDPOINT OF SALARY RANGE PER FINAL GRADE	—$45.98*

* —Statistically significant at .05.

*** —Statistically significant at .001.

P-x 30.

the quantity of the number of black employees." Rec. Vol. V at 174.[21]

Appellant's expert summarized his findings as follows:

> [There] are race-related differences, most of them significant in all of those variables, both in the hir-

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[21] During the certification hearing, appellee offered a statistical expert who presented a model, developed through a multiple regression analysis, of employee salaries. Using current white salaries as the dependent variable, the statistician first developed a model that would predict the salaries of whites given the following variables: the employee's tenure, job grade, and date of departure. The data were then plotted on a graph, with actual salary on the x-axis and "residual"—the difference between the actual salary and the predicted salary—on the y-axis. The residual values ranged from −180 (indicating an actual salary $180 less than the predicted salary) through zero (where actual salary equals predicted salary) to +180. Horizonal lines were drawn at zero—to represent the expected value—and −150 and +150—to represent two standard deviations. The plotted data fell randomly on either side of the zero line and generally within the lines representing two standard deviations. The distribution indicated that the graph accurately predicted white salaries.

The next step in the analysis was to see whether the white model would predict black salaries to a statistically significant degree. The data points all fell within two standard deviations of the expected value. From this, the appellee's expert concluded that the graph described a situation where race was not a factor. Rec. Vol. III at 232.

I would not consider this evidence sufficient to rebut appellant's showing for the following reason: All but two of the eleven data points for blacks fall below the expected value. In fact, the average residual value for blacks is −37.64, while the average for whites is, by definition, zero. Thus, appellee's own model shows that blacks received on average $37.64 per month less than whites, which tends to corroborate rather than rebut appellant's finding that blacks received $45.98 less than whites. While each individual data point might fall within two standard deviations of the expected value, this result fails to rebut appellant's evidence because the data points are skewed towards the low end of the scale. In fact, appellee's expert's only comment on this distribution was a less than ringing endorsement: "Well, the data is not clearly normal, but, then, again, it is not clearly non-normal." *Id.*

> ing part and in the treatment of present employees. . . . You get a consistent pattern of race-related differences, depending on how many people you have and what the—the number of characteristics you are talking about. Sometimes it is stronger than others, but it is very, very consistent in one particular direction . . . . *And, frankly, I think that that consistency is about equal or more important than any single figure or the significance levels.*

Rec. Vol. V at 175-176 (emphasis added).

On the basis of appellant's statistical evidence, and because of appellee's failure to rebut that evidence either by a direct attack on the statistics or by other means, I conclude that appellant has proved the existence of a pattern and practice of racial discrimination in the employment practices of appellee Ft. Worth Bank & Trust.

Individual Claims

In light of a finding of class-wide disparate treatment, I would hold that the district court erred in considering appellant's individual claim in the evidentiary framework of *McDonnell Douglas Corp. v. Green*, 422 U.S. 792, 93 S.Ct. 1817 (1973) and its progeny.[32] When an individual proves discrimination against a certified class of which she is a member, her individual claim proceeds in a different posture.

> The establishment of liability on the class claim operates to establish a prima facie case on behalf of each member of the class. Once the individual plaintiff proves that he applied unsuccessfully, the burden shifts to the employer to establish that its failure to hire that individual was the result of legitimate nondiscriminatory reasons.

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[32] *See, e.g., Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981).

Phillips v. Joint Legislative Committee, Etc., 637 F.2d 1014, 1031 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 2035 (1982). *See also Payne v. Travenol*, 673 F.2d at 818; *Craik v. Minnesota State University Board*, *supra*, 731 F.2d at 469-71.

A defendant against whom a finding of class-wide discrimination has been entered finds itself in the position of a "proved wrongdoer," and therefore no longer enjoys the presumption that its decisions were free of discriminatory intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1867 n.45 (1977). In fact, the presumption is that all the defendant's decisions were tainted by discriminatory intent. *Id.* at 1868. Thus, it is not sufficient, as it was in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 2950 (1978), that the employer merely "articulate some legitimate, nondiscriminatory reason for the employee's rejection," nor may the defendant escape, as in *Burdine*, 101 S. Ct. at 1094, without "persuad[ing] the court that it was actually motivated by the proffered reasons." On the contrary, the employer "has the burden of *proving* that the individual claimant was denied an employment opportunity for legitimate reasons." *Richardson v. Byrd*, *supra*, 709 F.2d at 1021. *See also*, *Phillips v. Joint Legislative Committee*, *supra* (employer must affirmatively establish that its decision "*was the result of* legitimate reasons") (emphasis added); *Craik v. Minnesota State University Board*, *supra*, 731 F.2d at 470 ("In pattern or practice cases, however, the presumption shifts to the employer not only the burden of production, but also the burden of persuading the trier of fact that it is more likely than not the employer did not unlawfully discriminate against the individual.") (footnote omitted). I would remand appellant's individual claim so that it may be considered in this framework.

Conclusion

This case should have been a reminder that discrimination need not manifest itself through the spoken word in order to exist. While the absence of the "smoking gun" might now be rare, *but see, e.g., Sylvester v. Callon Energy Services, Inc.*, 781 F.2d 520, 521 (5th Cir. 1986) (employer "wasn't sleeping with no nigger"), Title VII allows plaintiffs to seek redress from discrimination that operates covertly as well as overtly. While still waters run deep, this case should have shown that they are not necessarily pure.

Instead, the majority has shown that this circuit has learned the lesson of *Falcon* too well. Although *Falcon* is not a funeral pyre for broad class actions, the majority has chosen to place yet another stumbling block in the path of those who have long been denied justice. I have no doubt that the majority's opinion will be used, as it has been here, repeatedly to strike down and discourage legitimate claims. The clock may be turning back, but let us at least stay its hands a little longer to forestall the bleakness that seems apparent on the horizon.

The district court erred in failing to find racially disparate treatment against the proper class of applicants and employees, and I would accordingly reverse and remand for appropriate relief.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Northern District of Texas

Before GOLDBERG, RANDALL, and JOHNSON,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed equally against the parties, said costs to be taxed by the Clerk of this Court.

August 27, 1986

GOLDBERG, Circuit Judge, dissenting.

ISSUED AS MANDATE: Oct. 10, 1986.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING *EN BANC*

(Opinion 8/27/86, 5 Cir., 198-, —— F.2d ——)
(September 30, 1986)

Before GOLDBERG, RANDALL, and JOHNSON,
Circuit Judges

PER CURIAM:

(x) Treating the suggesting for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CA4-81-581-E

CLARA WATSON

vs.

FORT WORTH BANK & TRUST

PLAINTIFF'S EXHIBIT 9

RATE OF HIRE BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED	14.8%	(79)	3.5%	(5)
REJECTED	85.2%	(454)	96.5%	(139)
TOTAL	100.0%	(533)	100.0%	(144)

NOTE: Chi-Square significant at .0001.

PLAINTIFF'S EXHIBIT 10

OFFERS OF EMPLOYMENT BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	16.7%	(89)	4.2%	(6)
NO OFFER	83.3%	(444)	95.8%	(138)
TOTAL	100.0%	(533)	100.0%	(144)

NOTE: Chi-Square significant at .0001.

PLAINTIFF'S EXHIBIT 11

OFFERS TO SECRETARIAL APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	26.4%	(14)	0%	(0)
NO OFFER	73.6%	(39)	100.0%	(1)
TOTAL	100.0%	(53)	100.0%	(1)

NOTE: This table reports the Bank's decisions on all applicants specifically requesting a secretarial position.

PLAINTIFF'S EXHIBIT 12

OFFERS TO SECRETARIAL APPLICANTS, BY RACE:
LARGER POOL
SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	14.1%	(25)	0%	(0)
NO OFFER	85.9%	(152)	100.0%	(21)
TOTAL	100.0%	(177)	100.0%	(21)

NOTE: This table reports the Bank's decisions on all applicants who either specifically requested a secretarial position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 13

OFFERS TO TELLER APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	20.1%	(32)	5.3%	(3)
NO OFFER	79.9%	(127)	94.7%	(54)
TOTAL	100.0%	(159)	100.0%	(57)

NOTE: Chi-Square significant at .01. This table reports the Bank's decisions on all applicants who specifically requested a teller position.

PLAINTIFF'S EXHIBIT 14

TELLERS HIRED FROM TELLER APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED AS TELLER	18.2%	(29)	5.3%	(3)
NOT HIRED AS TELLER	81.8%	(130)	94.7%	(54)
TOTAL	100.0%	(159)	100.0%	(57)

NOTE: Chi-Square significant at .02. This table reports the Bank's teller decisions on all applicants who specifically requested a teller position.

PLAINTIFF'S EXHIBIT 15

OFFERS TO TELLER APPLICANTS, BY RACE:
LARGER POOL
SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFERS	14.8%	(44)	3.5%	(3)
NO OFFERS	85.2%	(253)	96.5%	(82)
TOTAL	100.0%	(297)	100.0%	(85)

NOTE: Chi-Square significant at .01. This table reports the Bank's decisions on all applicants who either specifically requested a teller position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 16

TELLERS HIRED FROM TELLER APPLICANTS, BY RACE:

LARGER POOL

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED AS TELLER	10.1%	(30)	3.5%	(3)
NOT HIRED AS TELLER	89.9%	(267)	96.5%	(82)
TOTAL	100.0%	(297)	100.0%	(85)

NOTE: This table reports the Bank's teller decisions on all applicants who either specifically requested a teller position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 17

OFFERS TO CLERICAL APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	15.2%	(30)	4.8%	(3)
NO OFFER	84.8%	(168)	95.2%	(60)
TOTAL	100.0%	(198)	100.0%	(63)

NOTE: Chi-Square significant at .05. This table reports the Bank's decisions on all applicants who specifically requested a clerical position other than secretary or teller.

PLAINTIFF'S EXHIBIT 18

OFFERS TO CLERICAL APPLICANTS, BY RACE:
LARGER POOL
SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	13.3%	(42)	3.6%	(3)
NO OFFER	86.7%	(273)	96.4%	(80)
TOTAL	100.0%	(315)	100.0%	(83)

NOTE: Chi-Square significant at .01. This table reports the Bank's decisions on all applicants who either specifically requested a clerical position other than secretary or teller or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 19

CLERKS HIRED FROM CLERICAL APPLICANTS, BY RACE:

LARGER POOL

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
HIRED AS CLERK	11.4%	(36)	2.4%	(2)
NOT HIRED AS CLERK	88.6%	(279)	97.6%	(81)
TOTAL	100.0%	(315)	100.0%	(83)

NOTE: This table reports the Bank's clerical decisions on all applicants who either specifically requested a clerical position other than secretary or teller or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 20

OFFERS TO NON-PROFESSIONAL APPLICANTS, BY RACE

SUMMARY OF EXHIBIT 6

	WHITES	BLACKS
OFFER	22.2% (2)	0% (0)
NO OFFER	77.8% (7)	100.0% (5)
TOTAL	100.0% (9)	100.0% (5)

NOTE: This table reports the Bank's decisions on all applicants who specifically requested a non-professional position.

PLAINTIFF'S EXHIBIT 21

OFFERS TO NON-PROFESSIONAL APPLICANTS, BY RACE:

LARGER POOL

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	10.8%	(14)	0%	(0)
NO OFFER	89.2%	(116)	100.0%	(24)
TOTAL	100.0%	(130)	100.0%	(24)

NOTE: This table reports the Bank's decisions on all applicants who either specifically requested a non-professional position or left open the position for which they wished to be considered.

PLAINTIFF'S EXHIBIT 22

APPLICANTS BY RACE,
IN DIFFERENT HIRING PERIODS

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
PERIODS DURING WHICH LESS THAN 10% OF APPLICANTS HIRED	48.6%	(259)	52.8%	(76)
PERIODS IN WHICH MORE THAN 10% OF APPLICANTS HIRED	51.4%	(274)	47.2%	(68)
TOTAL	100.0%	(533)	100.0%	(144)

NOTE: Chi-Square probability equals .37. This table reports whether each applicant sought a bank position during a period when the Bank hired less than 10% of its applicants or during a period when the Bank hired more than 10% of its applicants.

PLAINTIFF'S EXHIBIT 23A

OFFERS TO PERSONS, BY RACE, WHO APPLIED DURING PERIODS WHEN BANK HIRED LESS THAN TEN PERCENT (10%) OF APPLICANTS

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	11.2%	(29)	3.9%	(3)
NO OFFER	88.8%	(230)	96.1%	(73)
TOTAL	100.0%	(259)	100.0%	(76)

NOTE: Chi-Square significant at .05.

PLAINTIFF'S EXHIBIT 23B

OFFERS TO PERSONS, BY RACE, WHO APPLIED DURING PERIODS WHEN BANK HIRED OVER TEN PERCENT (10%) OF APPLICANTS

SUMMARY OF EXHIBIT 6

	WHITES		BLACKS	
OFFER	21.9%	(60)	4.4%	(3)
NO OFFER	78.1%	(214)	95.6%	(65)
TOTAL	100.0%	(274)	100.0%	(68)

NOTE: Chi-Square significant at .001.

PLAINTIFF'S EXHIBIT 24

DEPARTMENTAL SEGREGATION, BY RACE

SUMMARY OF DEFENDANT'S PERSONNEL HISTORIES

	NON-BLACK PERSON-MONTHS		BLACK PERSON-MONTHS	
NON-OPERATIONS DEPARTMENTS	15.0%	(403)	0%	(0)
OPERATIONS DEPARTMENTS	85.0%	(2224)	100.0%	(444.5)
TOTAL	100.0%	(2627)	100.0%	(444.5)

NOTE: Chi-Square significant at .001.

PLAINTIFF'S EXHIBIT 25

DEPARTMENTAL SEGREGATION, BY RACE:

EXPANDED TABLE

SUMMARY OF DEFENDANT'S PERSONNEL HISTORIES

	NON-BLACK PERSON-MONTHS		BLACK PERSON-MONTHS	
NON-OPERATIONS DEPARTMENTS	100.%	(403)	0%	(0)
PUBLIC OPERATIONS DEPARTMENTS	85 %	(2004.75)	15%	(356.5)
NON-PUBLIC OPERATIONS DEPARTMENTS	71 %	(219.25)	29%	(88)
TOTAL	86 %	(2627)	14%	(444.5)

NOTE: Chi-Square significant at .001.

PLAINTIFF'S EXHIBIT 26

MEAN EVALUATIONS, BY RACE, DURING PERIOD OF CLASS

SUMMARY OF EXHIBIT 8

	NON-BLACKS	BLACKS
FIRST EVALUATION	78.0	*** 63.0
SECOND EVALUATION	82.8	** 69.2
THIRD EVALUATION	84.6	** 73.9
FOURTH EVALUATION	85.9	* 74.7

*—Statistically significant at .05.
**—Statistically significant at .01.
***—Statistically significant at .001.

PLAINTIFF'S EXHIBIT 27

INTERCORRELATION OF EMPLOYEE EVALUATIONS

SUMMARY OF EXHIBIT 8

	1st Evaluation	2nd Evaluation	3rd Evaluation	4th Evaluation
1st Evaluation		.74	.70	.71
2nd Evaluation			.69	.57
3rd Evaluation				.71
4th Evaluation				

NOTE: This table reports the Pearson product-moment correlation coefficient for each pair of evaluations. All coefficients are significant at .001.

PLAINTIFF'S EXHIBIT 28

STATISTICAL REGRESSIONS FOR EMPLOYEE EVALUATIONS, BY RACE

SUMMARY OF EXHIBIT 8

Dependent Variable	Controlled Variables	Coefficient of Race
First Evaluation	(A) Experience At Hire (B) Grade At Hire	−34.37
Second Evaluation	(A) And (B)	−39.91

NOTE: This table reports that, after controlling for the effects of experience and grade at hire, blacks scored 34.37 points below non-blacks on their first evaluation during the period of the class. The coefficient of −39.91 has an equivalent interpretation. Both coefficients are significant at .001.

PLAINTIFF'S EXHIBIT 29

PROMOTIONS AND COMPENSATION, BY RACE

SUMMARY OF EXHIBIT 8

	NON-BLACKS	BLACKS
AVERAGE ANNUAL INCREASE IN GRADE	.53	.18
AVERAGE ANNUAL INCREASE IN SALARY	14.9 %	12.0 %
AVERAGE FINAL GRADE	5.29	4.13
AVERAGE FINAL SALARY	$917.15	$861.47

PLAINTIFF'S EXHIBIT 30

PROMOTION AND COMPENSATION REGRESSIONS

SUMMARY OF EXHIBIT 8

DEPENDENT VARIABLE	CONTROLLED VARIABLES	COEFFICIENT FOR RACE
AVERAGE ANNUAL INCREASE IN GRADE	(A) EDUCATION (B) FIRST GRADE DURING CLASS PERIOD	— .6 ***
FINAL GRADE	EDUCATION	—1.22***
FINAL GRADE	EXPERIENCE AT FINAL DATE	—1.21***
FINAL GRADE	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION	—1.38***
FINAL SALARY	(A) EDUCATION (B) EXPERIENCE AT FINAL DATE (C) FIRST EVALUATION (D) SECOND EVALUATION (E) MIDPOINT OF SALARY RANGE PER FINAL GRADE	—$45.98*

NOTE: The coefficients for race should be interpreted precisely as were the coffiicents for race of Exhiibt 28.

*—Statistically significant at .05.

***—Statistically significant at .001.

PLAINTIFF'S EXHIBIT 31

RATE OF INVOLUNTARY TERMINATION, BY RACE

SUMMARY OF DEFENDANT'S PERSONNEL HISTORIES AND OF JOY CHANDLER'S TESTIMONY AT CLASS CERTIFICATION HEARING

	NON-BLACKS		BLACKS	
INVOLUNTARILY TERMINATED	11%	(17)	20.0%	(3)
NOT INVOLUNTARILY TERMINATED	89%	(133)	80.0%	(12)
TOTAL	100.0%	(150)	100.0%	(15)

DEFENDANT'S EXHIBIT 1

SALARY COMPARISON—TELLERS

	10/21/79	3/1/80	3/1/81
CLARA WATSON	655	700	765
MILDRED DAY	660	660	765
JULIE GIFFORD	—*	—*	725
LINDA SHELL	600	650	735
TRICIA O'KEEFE	—**	—**	—**

*Did not start until 10/9/80.

**Not employed during class period, left in 1976.

DEFENDANT'S EXHIBIT 2

APPLICANT DATA

October 21, 1979-March 1, 1984

TOTAL APPLICANTS DURING RELEVANT PERIOD	789	
Blacks	145	18.4%
Non-Blacks	581	73.6%
Unknown	63	8.0%
TOTAL JOBS AVAILABLE	87	
TOTAL OPENINGS SOUGHT BY BLACKS	35	
Percent of Available Jobs		40.2%
TOTAL APPLICANTS WHEN JOBS AVAILABLE	277	
Blacks	63	22.7%
Non-Blacks	214	77.3%
BLACKS HIRED OR OFFERED JOBS	7	
HIRE RATIO (7 of 35)		20.0%
ESTIMATED BLACK HIREES IF BLACKS HAD APPLIED FOR ALL OPENINGS	17.4	
SECRETARIAL JOBS OPEN DURING RELEVANT PERIOD	10	
TOTAL APPLICANTS	23	
Blacks	1	4.3%
Non-Blacks	22	95.7%
CASH MANAGEMENT JOBS OPEN DURING RELEVANT PERIOD (All opening filled from within—No Black employees applied)	0	

DEFENDANT'S EXHIBIT 3

March 1, 1984

Survey of Utilization of Blacks: Tarrant County Banks
70 Million-150 Million In Assets

Bank No.	Total Non-Exempt Employees	Total Black Non-Exempt Employees	Total Black Supervisors	Ratio of Black Employees To All Employees
1	82	1	0	1.2%
2	59	3	1	5.1%
3	53	5	0	9.4%
4	68	15	0	22.1%
5	52	2	0	3.9%
6	70	3	0	4.3%
7	90	10	2	11.1%
8	76	3	0	4.0%
9	44	10	0	22.7%
10	87	1	0	1.2%
11	68	1	0	1.5%
12	39	2	0	5.1%
13	46	0	0	0.0%
14	40	5	0	12.5%
Average	62.4	4.4	0.2	7.1%
FWBT	61.0	8.0	1.0	13.1%

DEFENDANT'S EXHIBIT 4

FORT WORTH BANK and TRUST

Salary Computations by Grade for 10/21/79

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	580.20	550.00	600.33
2	575.00	610.00	557.50
3	610.00	550.00	630.00
4	634.43	597.33	643.70

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/80

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	570.40	565.00	574.00
2	598.75	600.00	597.50
4	657.86	654.00	658.64

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/81

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	585.00	585.00	0.00
2	625.83	652.50	612.50
4	726.81	720.00	728.33
5	713.61	720.00	712.55

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/82

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	699.00	699.00	0.00
2	747.50	765.00	741.66
3	738.50	869.00	608.00
5	856.66	857.75	856.47
6	850.62	880.00	960.71

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/83

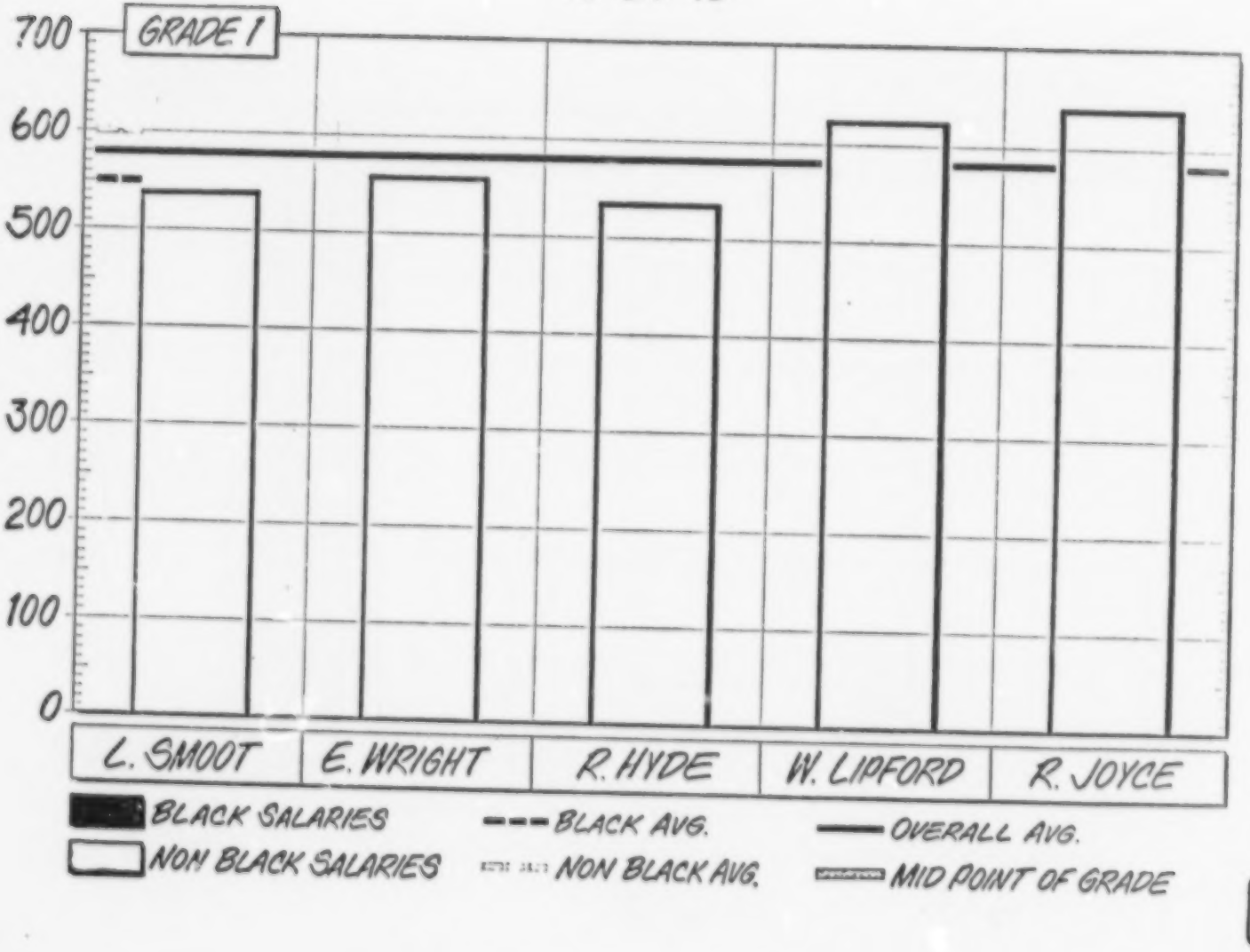
GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	755.00	755.00	0.00
3	956.00	956.00	0.00
5	855.25	886.40	885.00
6	967.50	950.00	971.00

FORT WORTH BANK and TRUST

Salary Computations by Grade for 3/1/84

GRADE	OVERALL AVG. SALARY	BLACK AVG. SALARY	NON-BLACK AVG. SALARY
1	800.00	800.00	0.00
4	924.33	1031.00	903.00
5	981.15	1016.75	976.07
6	1018.40	1017.00	1018.75
7	1214.87	1200.00	1217.00

10-21-79



DEFENDANT'S EXHIBIT 5A

DEFENDANT'S EXHIBIT 5

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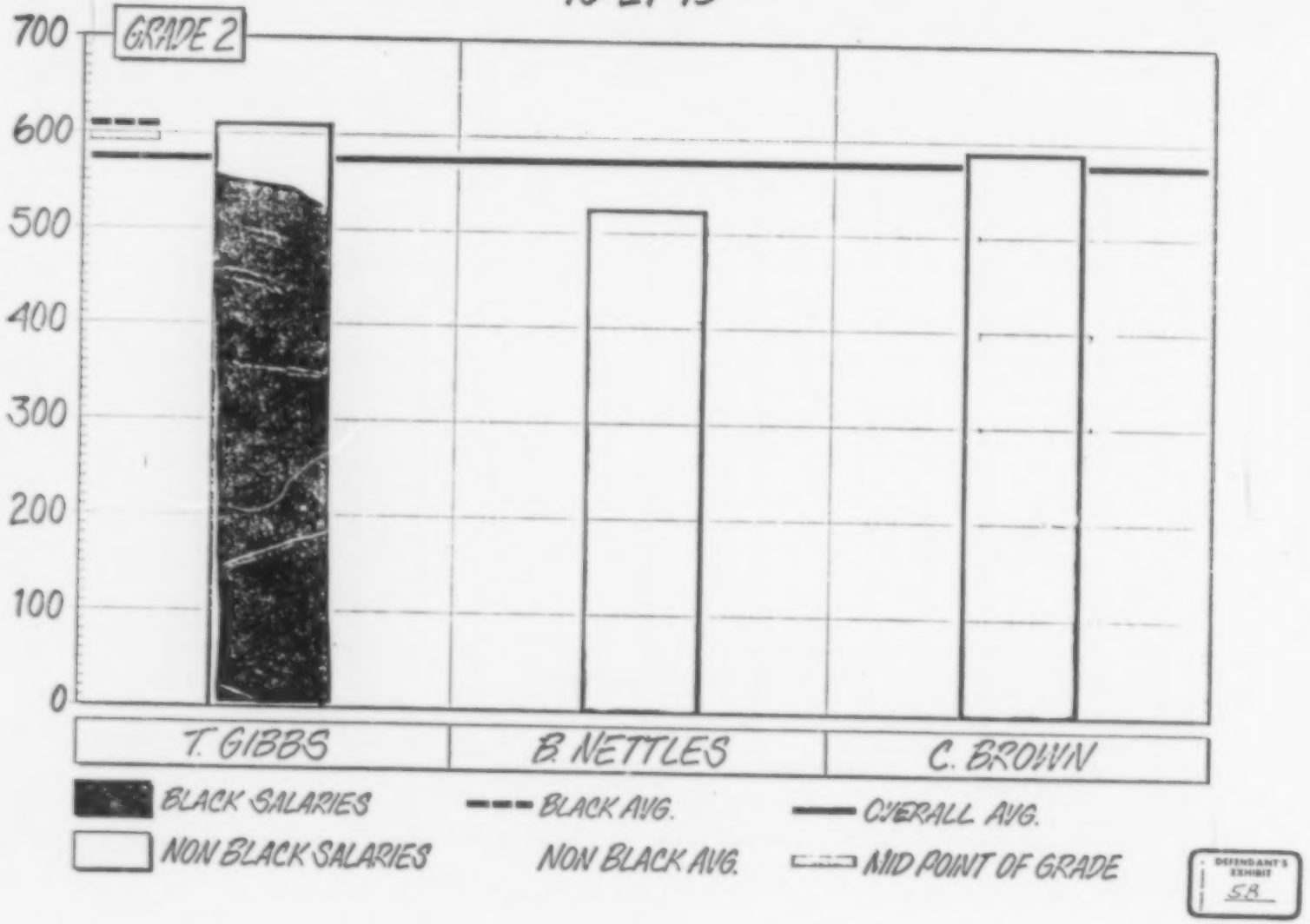
EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

10-21-79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B. NETTLES
C. BROWN
BLACK SALARIES
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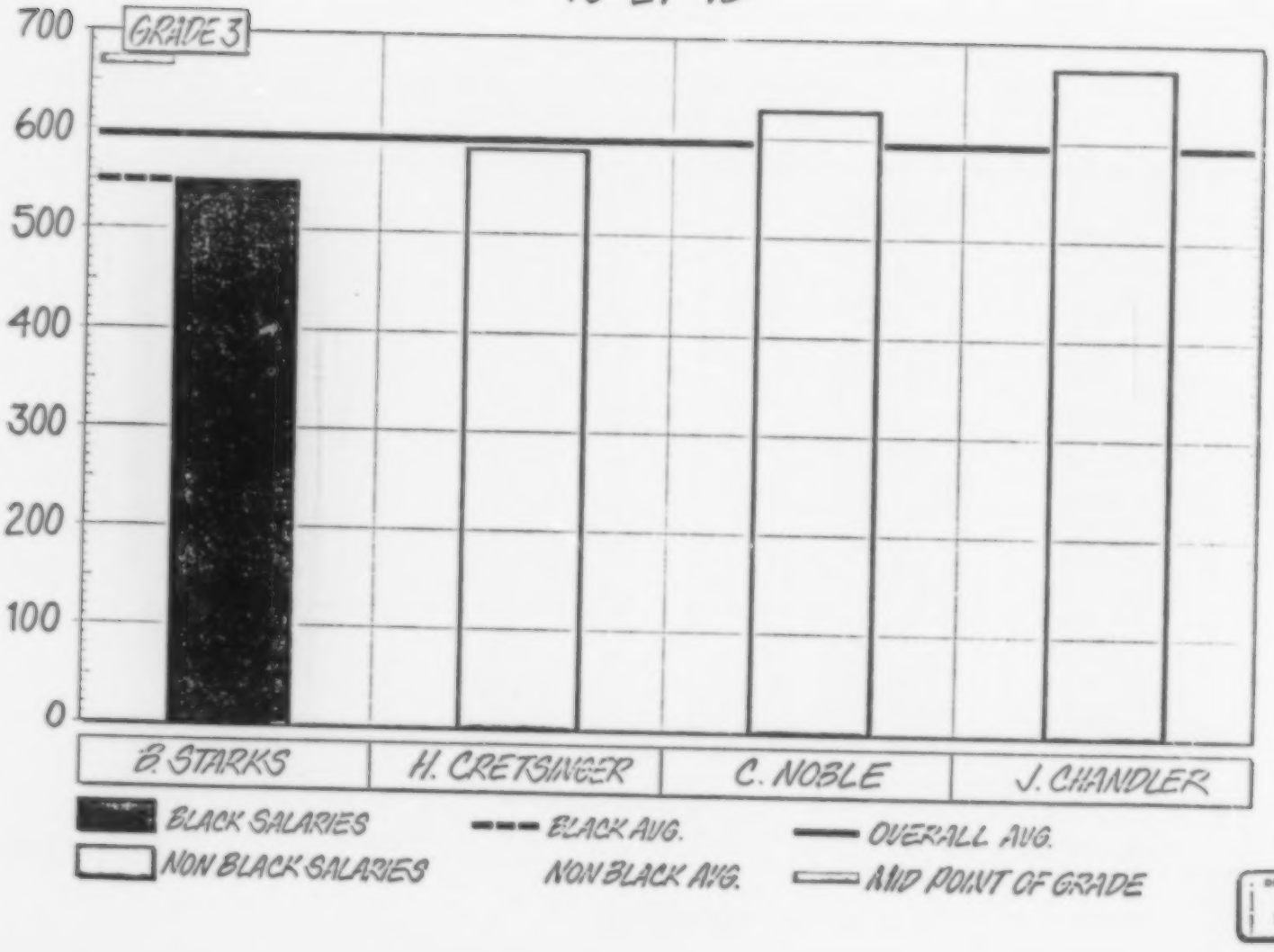
MID POINT OF GRADE
DEFENDANT'S EXHIBIT
58

10-21-79



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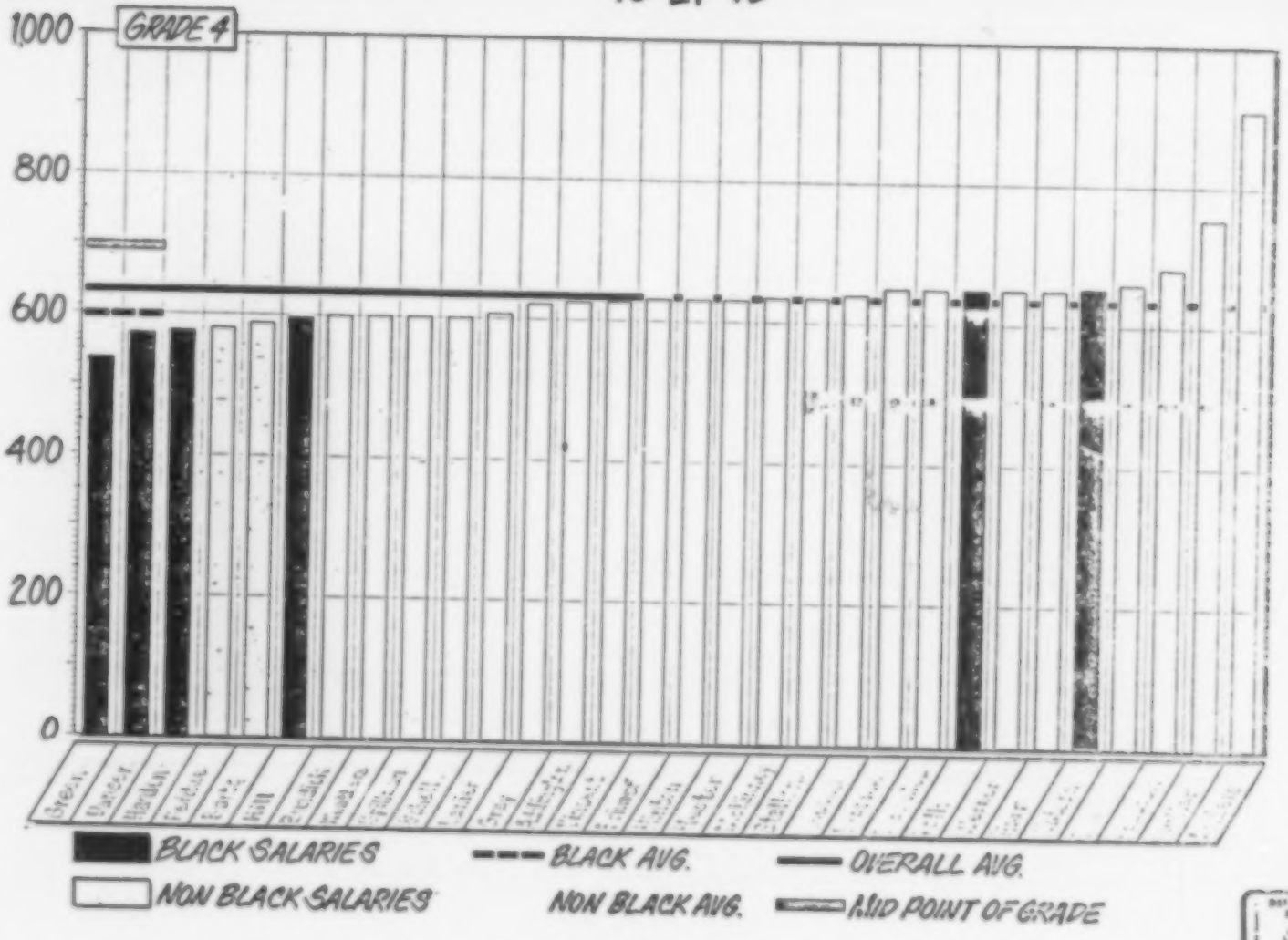
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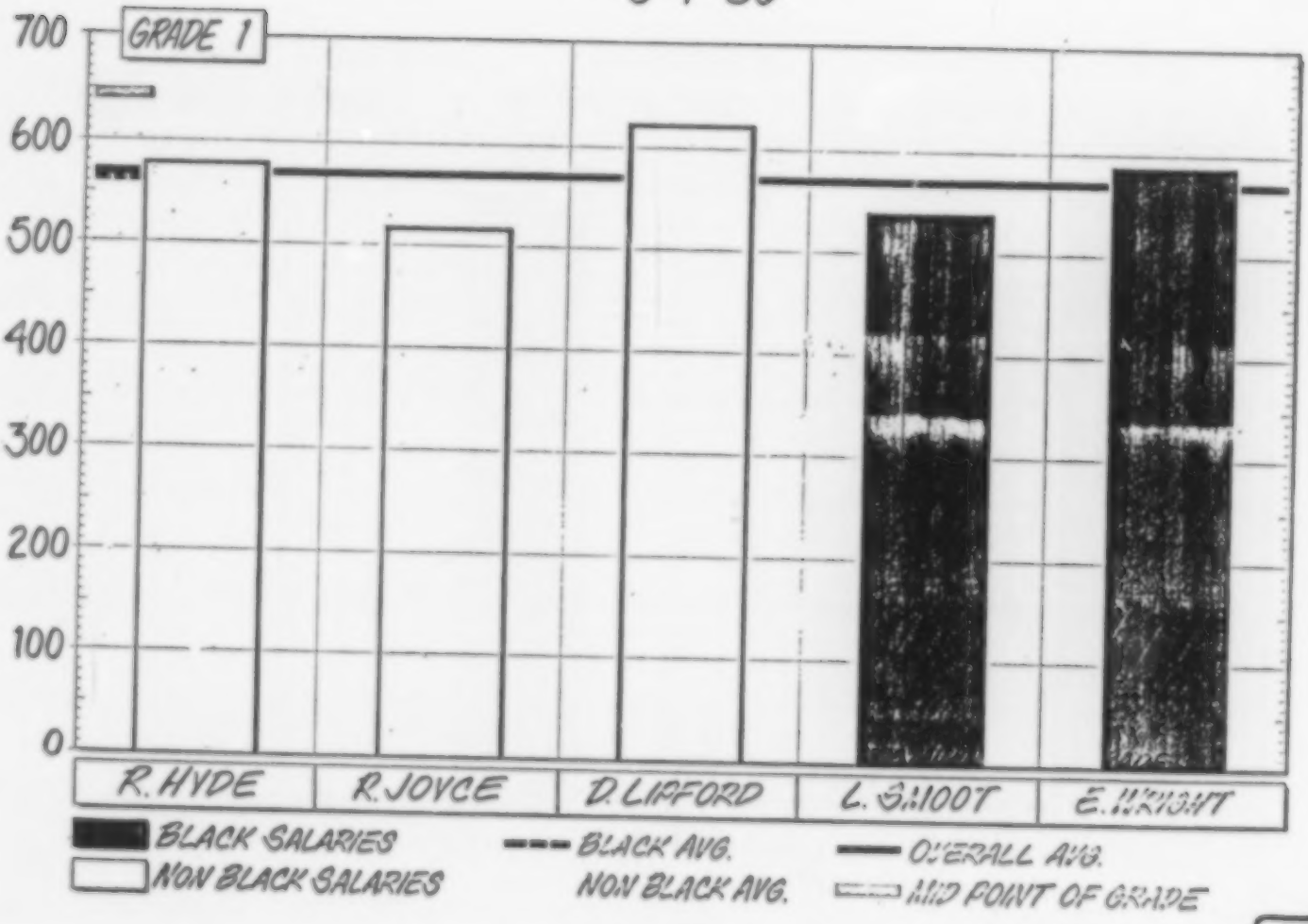
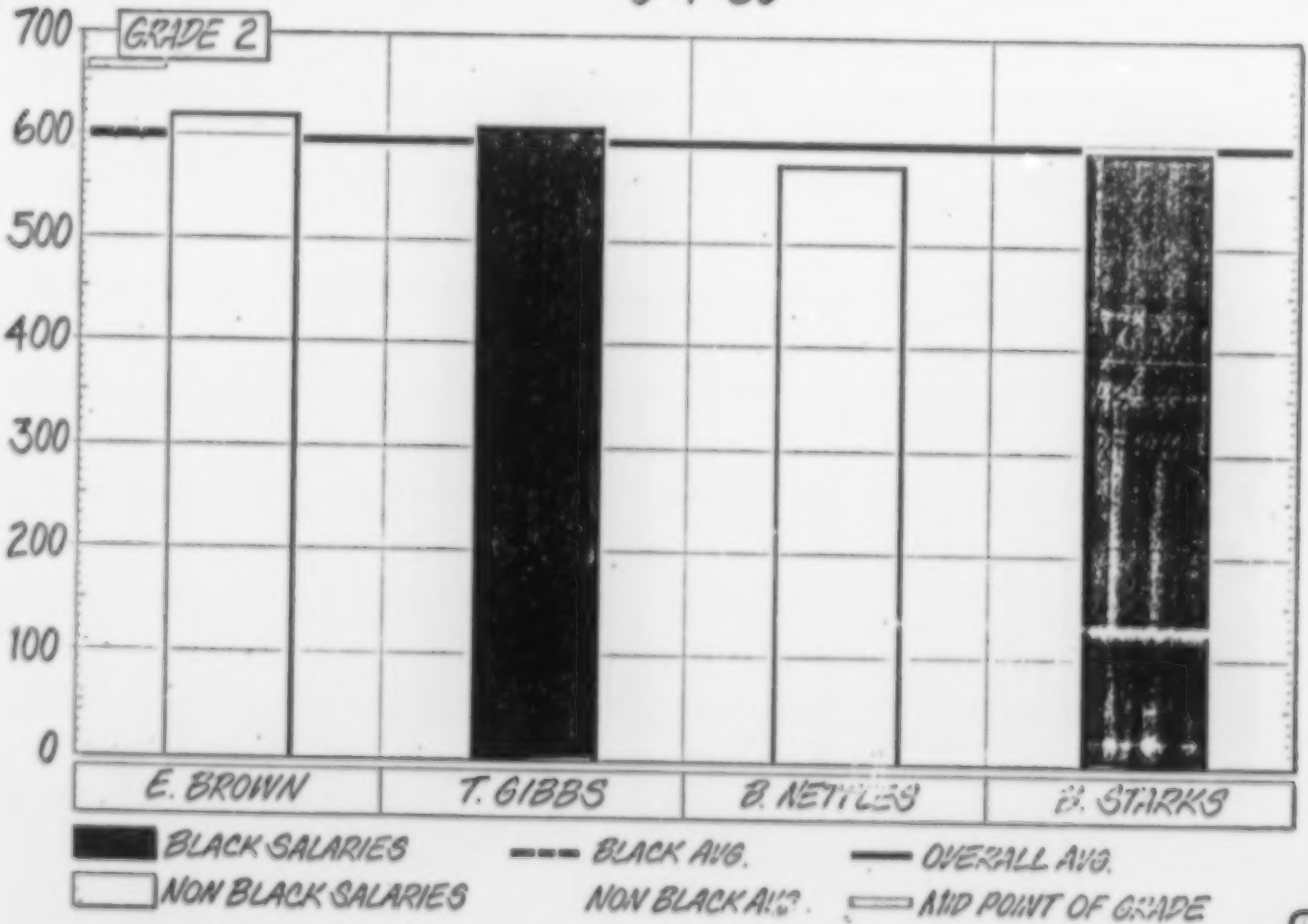
OVERALL AVG.
MID POINT OF GRADE
DEFENDANT'S EXHIBIT
SD

3-1-80



DEFENDANT'S EXHIBIT 5E

3-1-80


GRADE 2
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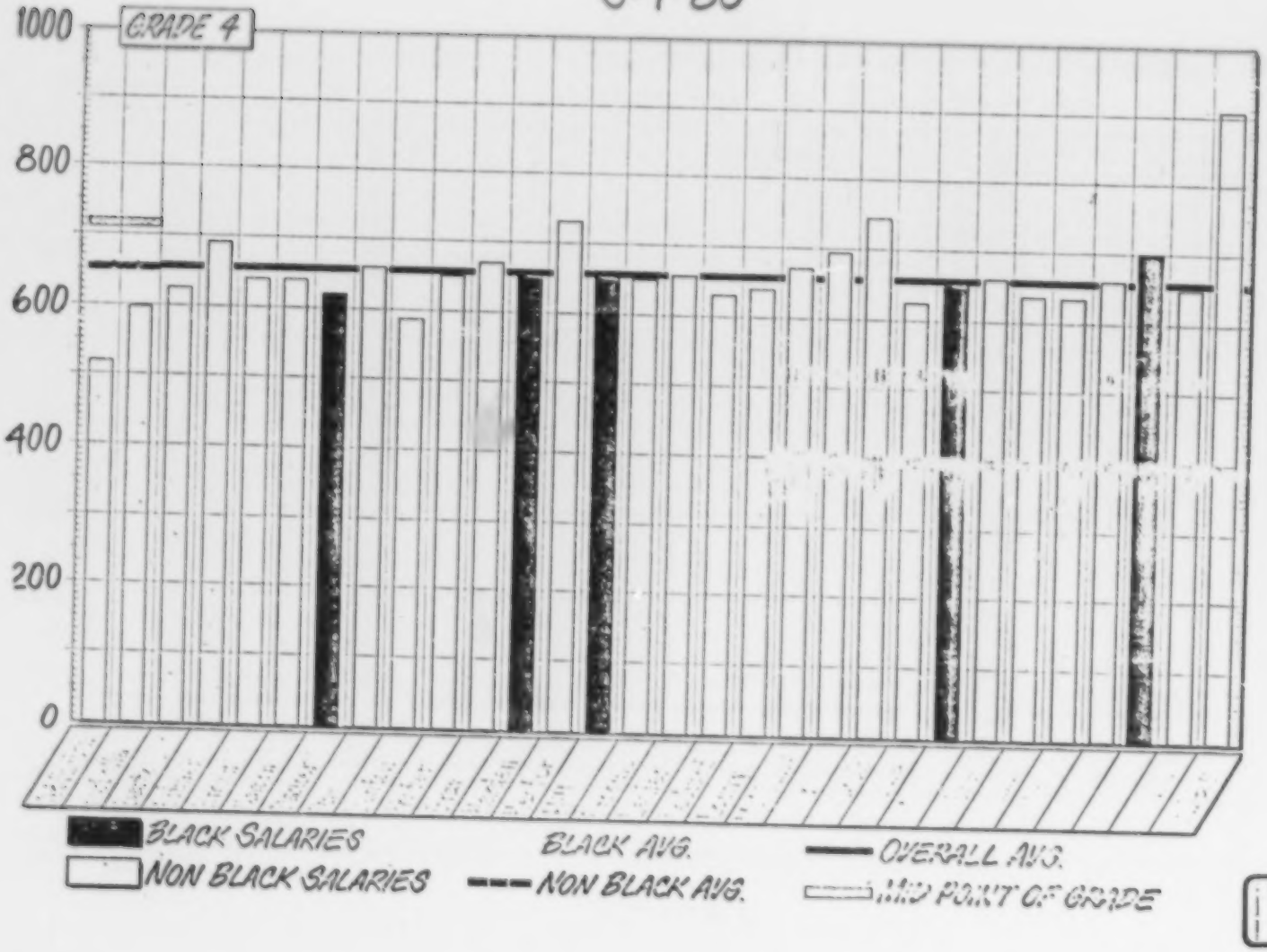
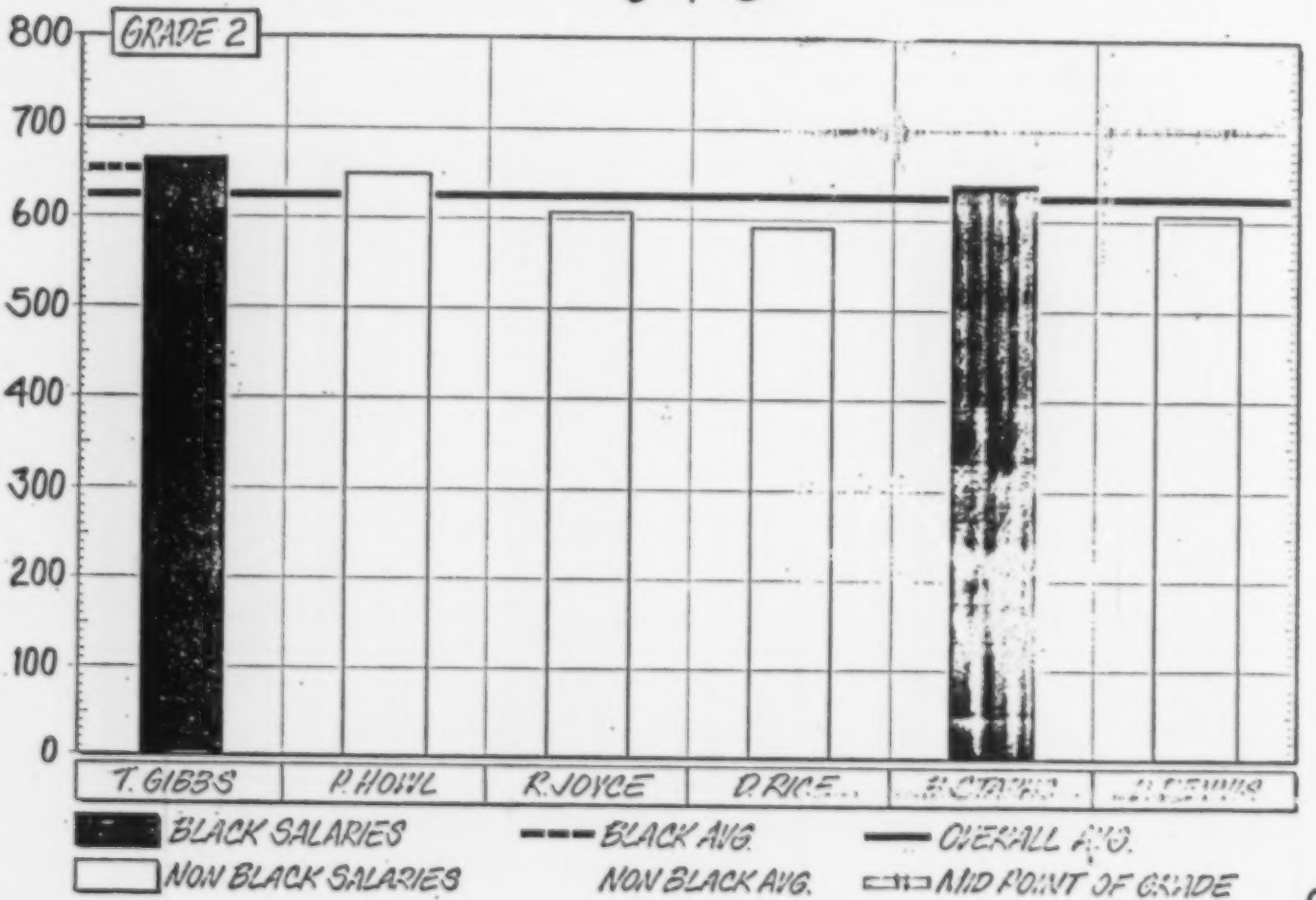
E. BROWN
T. GIBBS
B. NETTLES
B. STARKS
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-80



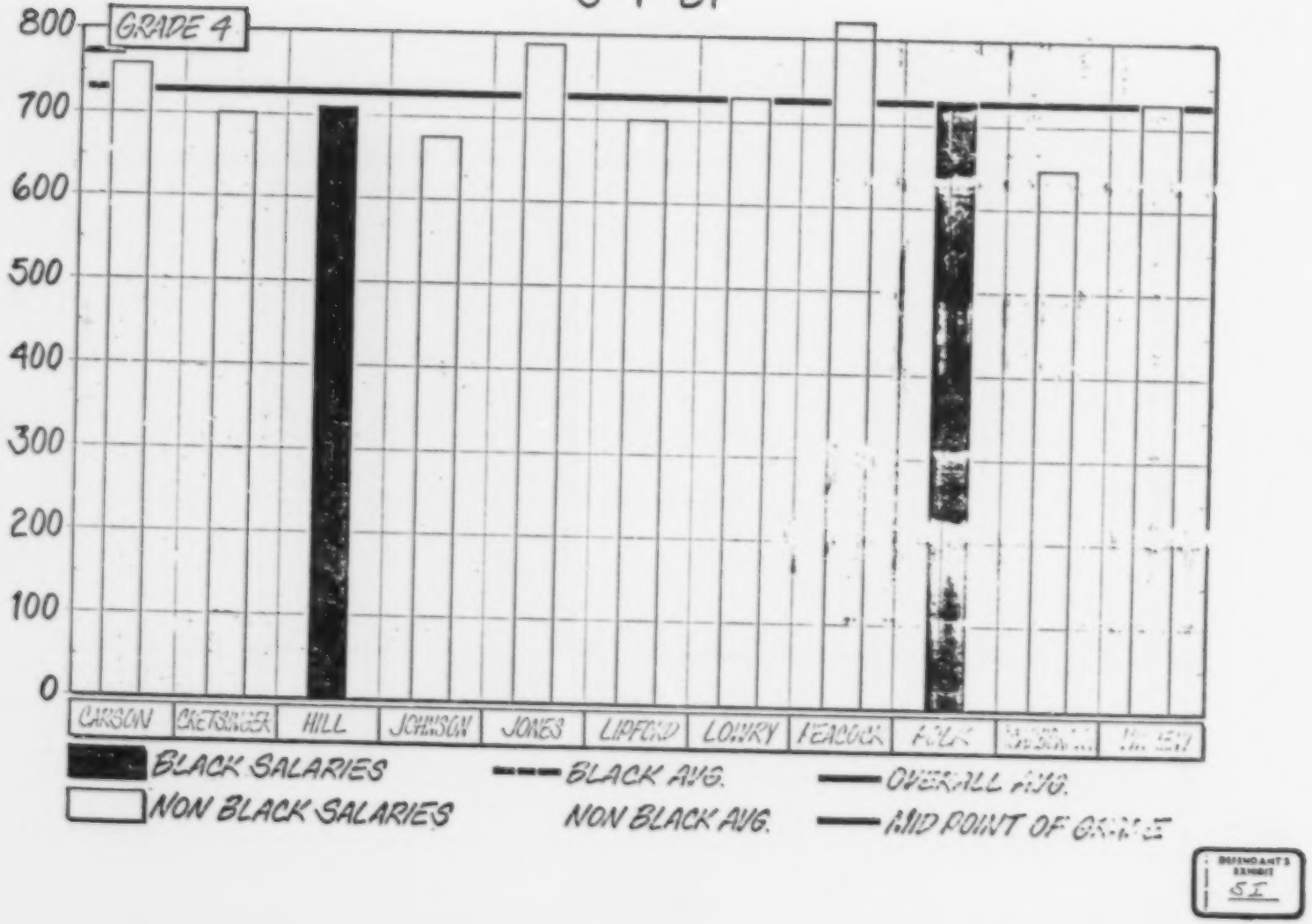
DEFENDANT'S EXHIBIT 56

3-1-81



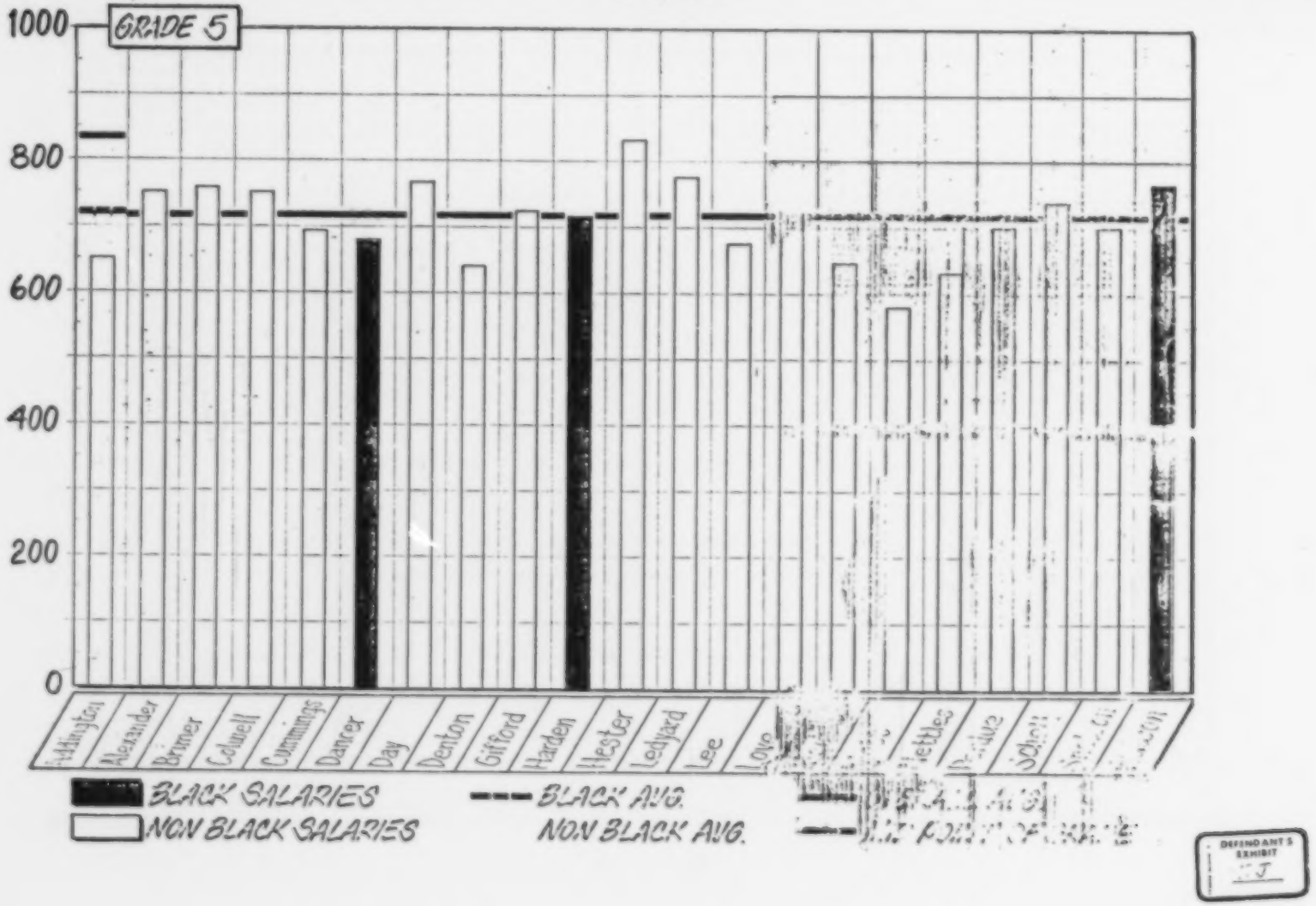
DEFENDANT'S EXHIBIT SH

3-1-81



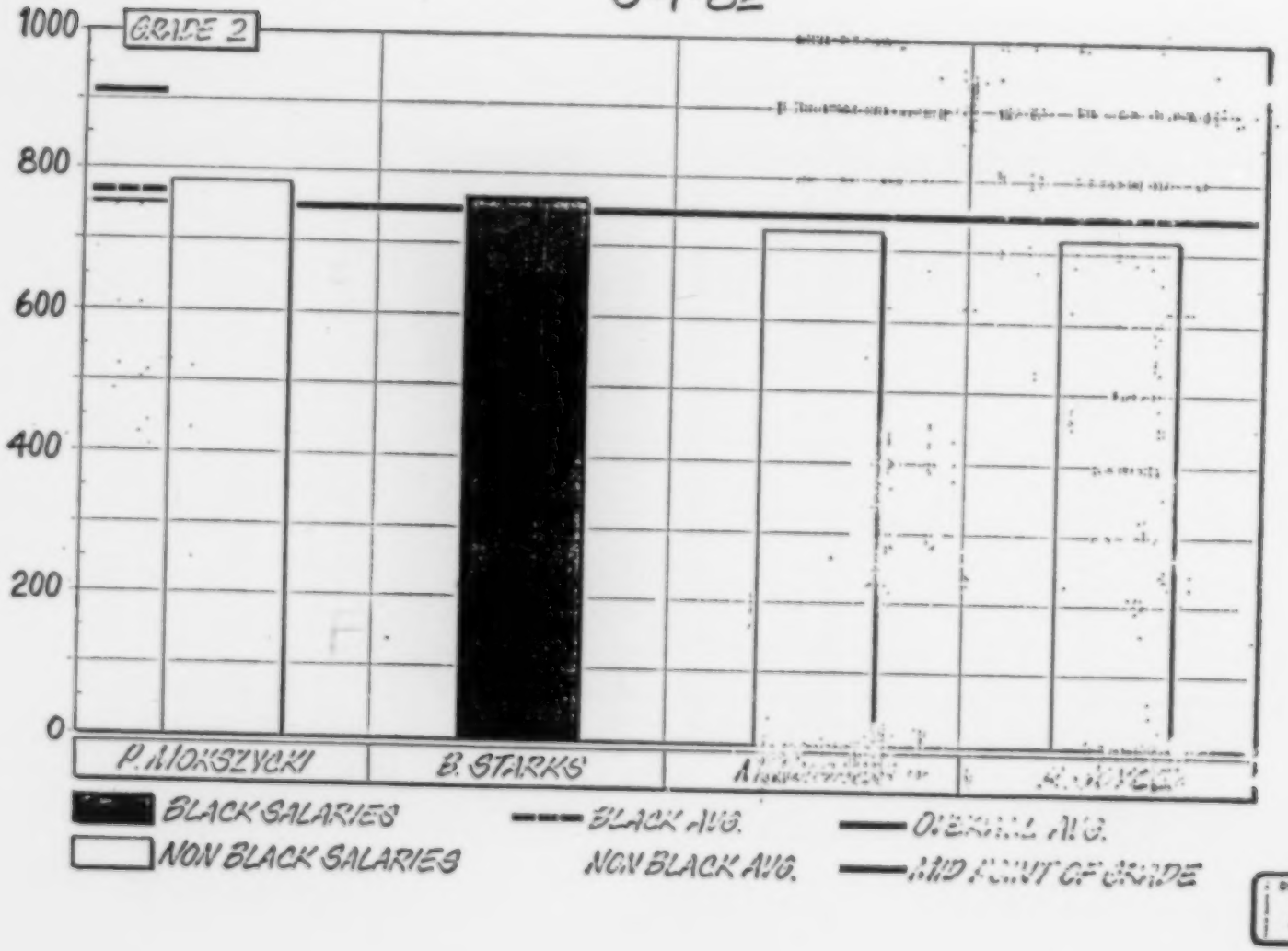
DEFENDANT'S EXHIBIT 51

3-1-81



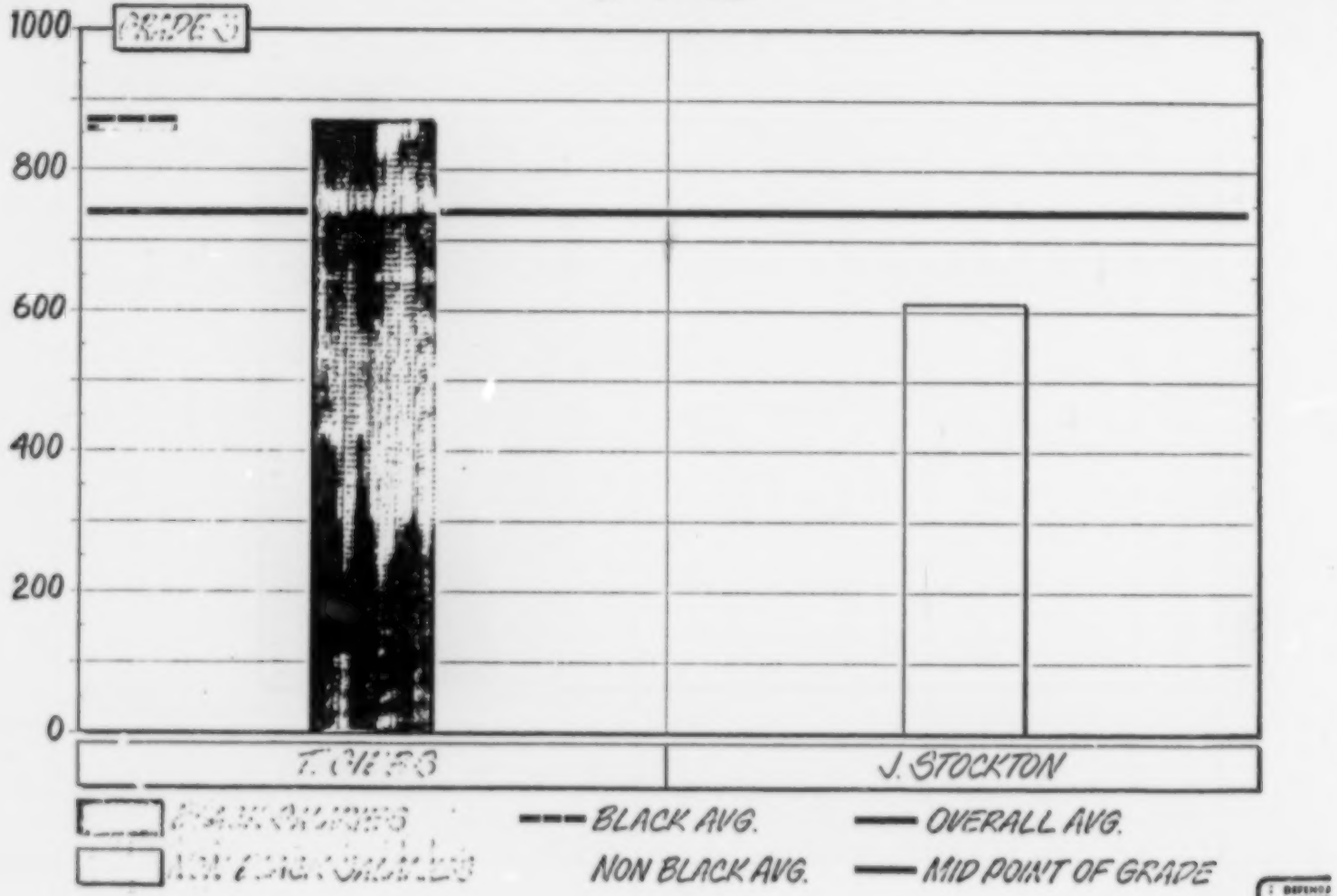
DEFENDANT'S EXHIBIT J

3-1-82

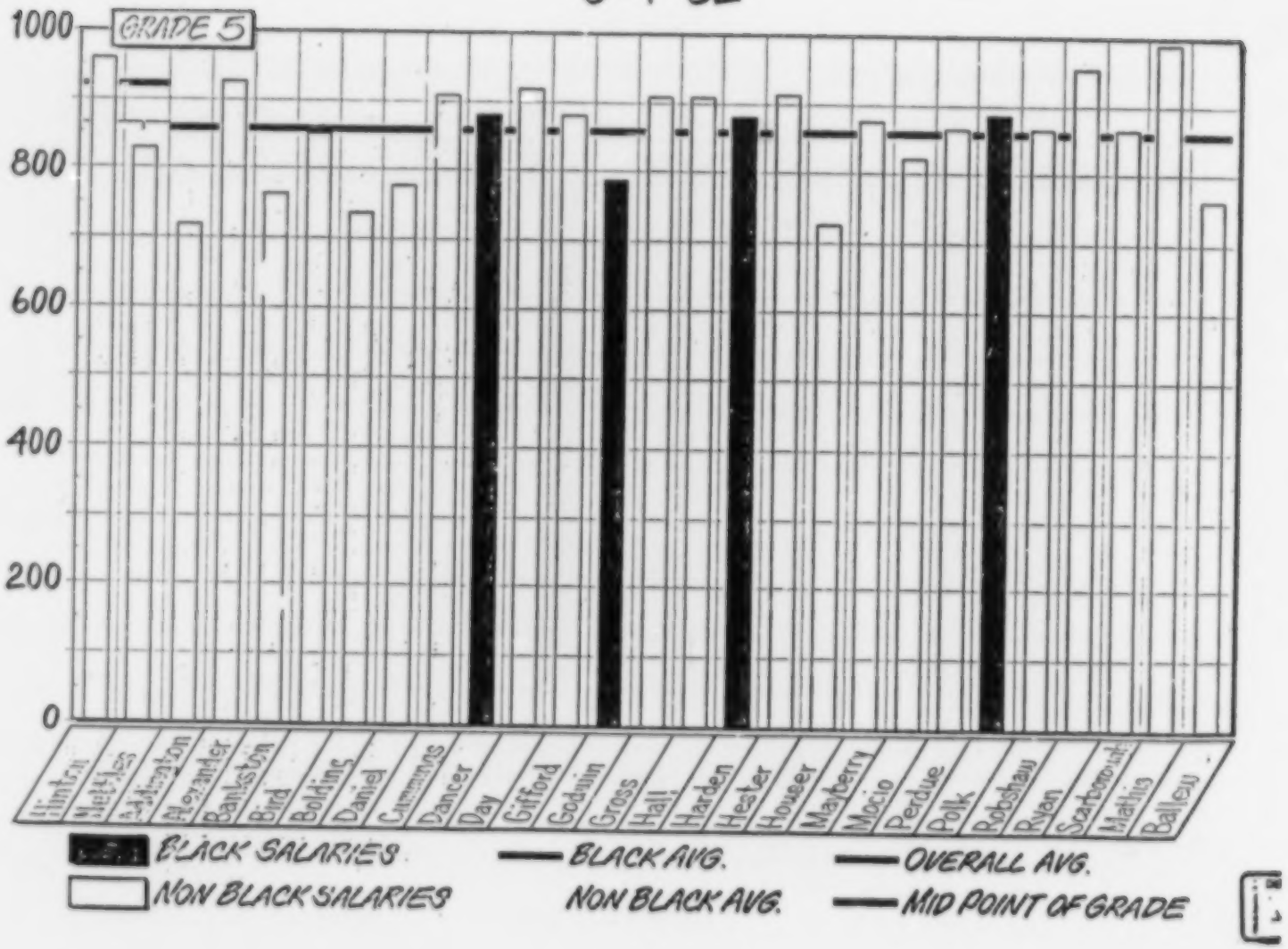


DEFENDANT'S EXHIBIT 5K

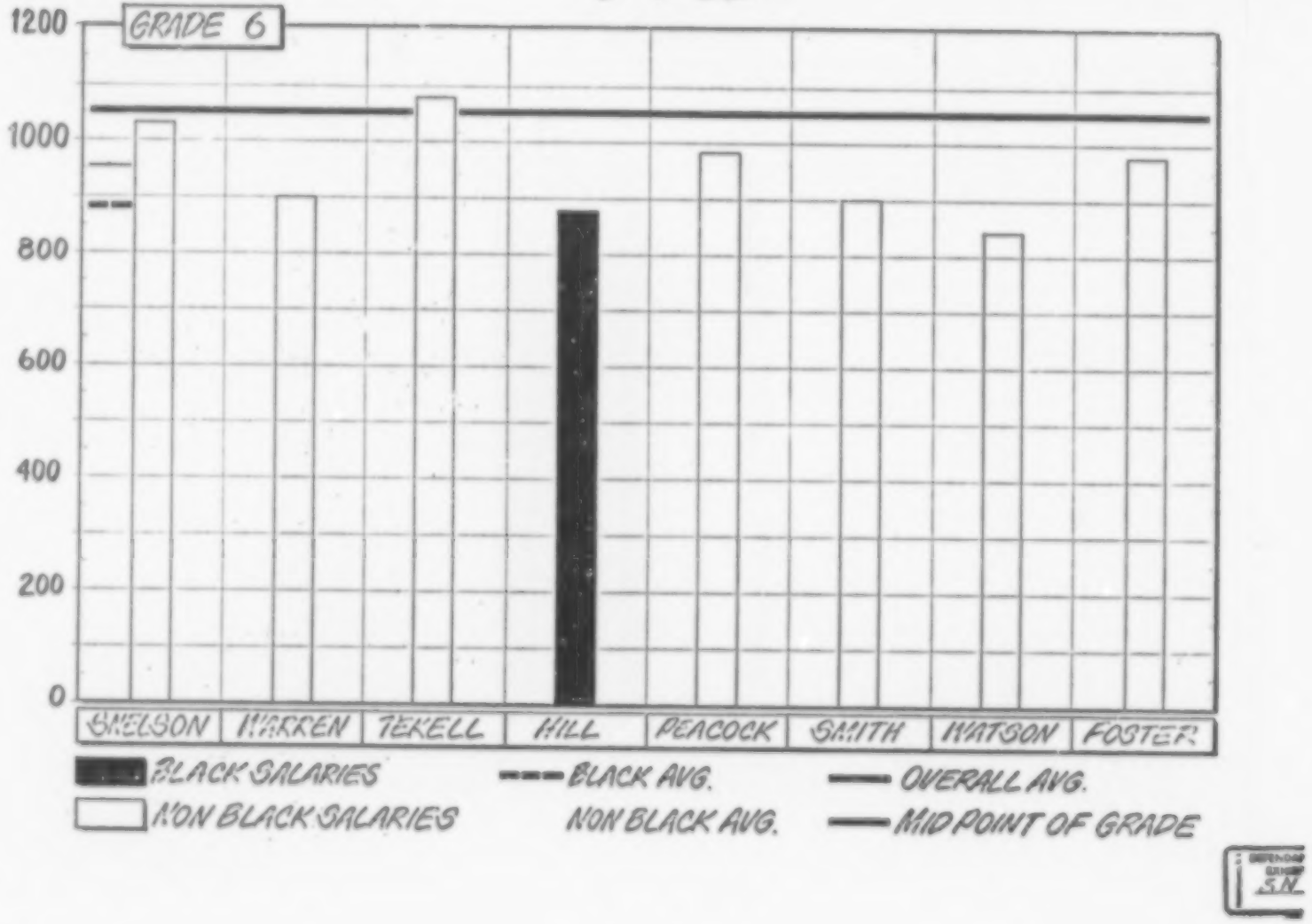
3-1-82


1000
800
600
400
200
0
GRADES
T. CHEEKS
J. STOCKTON
BLACK AVG.
OVERALL AVG.
NON BLACK AVG.
MID POINT OF GRADE

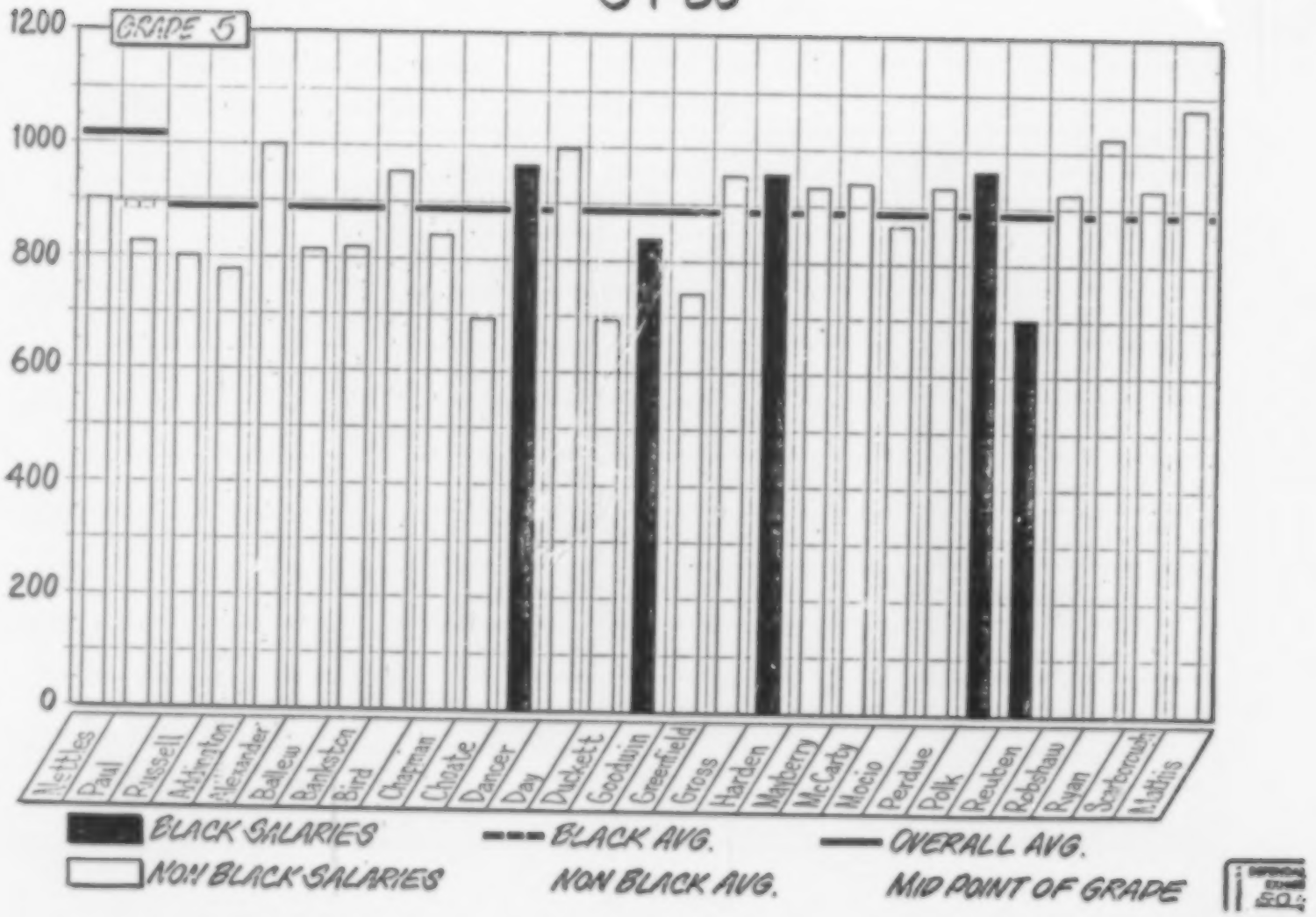
3-1-82


GRADE 5
1000
800
600
400
200
0
Hinton
Mathias
Edmonston
Alexander
Bankston
Bird
Bolding
Daniel
Cummings
Dancer
Day
Gifford
Godwin
Gross
Hall
Harden
Hester
Howser
Mayberry
Mocio
Perdue
Polk
Robshaw
Ryan
Scarborough
Mathis
Ballew
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

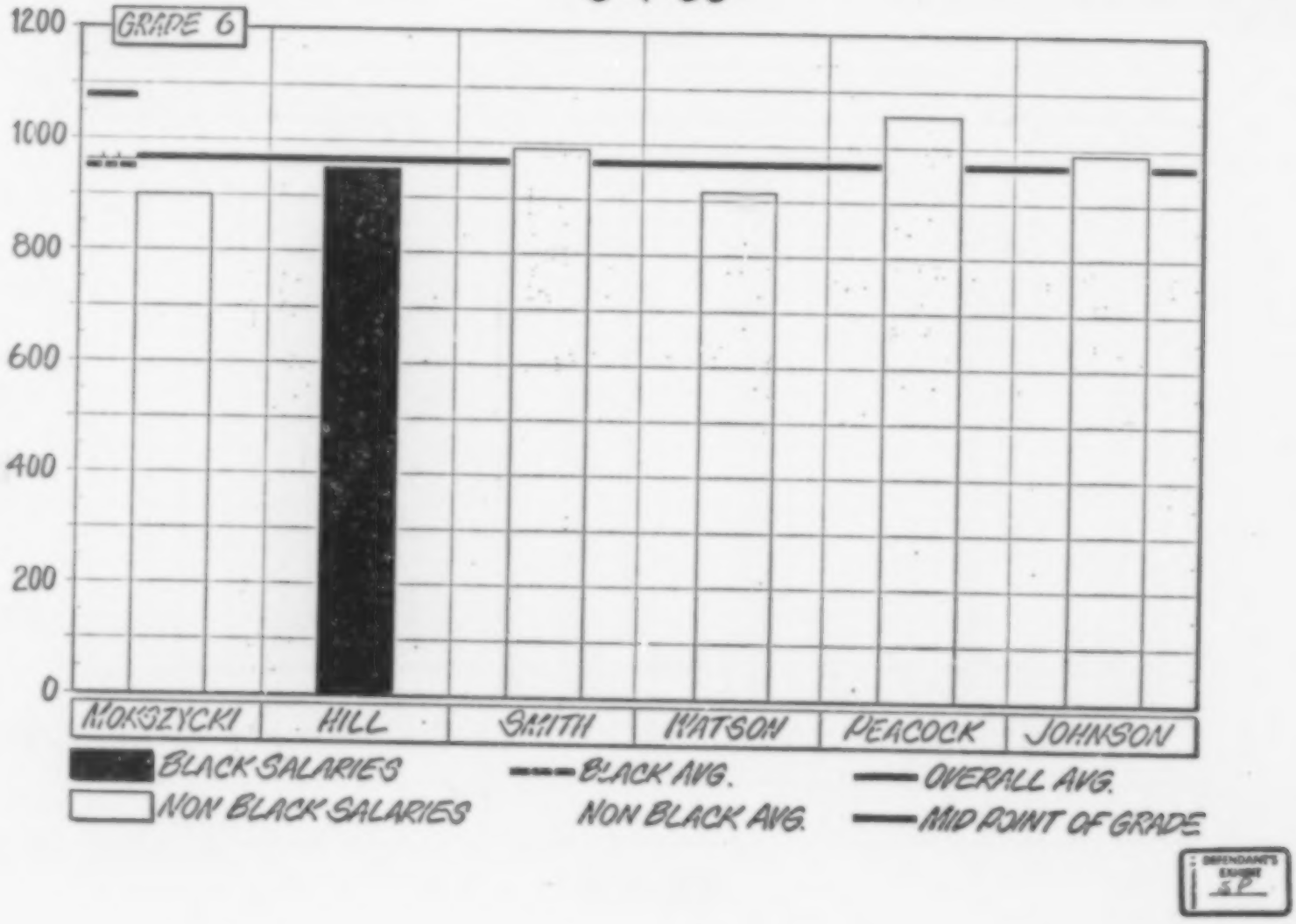
3-1-82


GRADE 6
1200
1000
800
600
400
200
0
NELSON
WARREN
TEKELL
HILL
PEACOCK
SMITH
WATSON
FOSTER
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

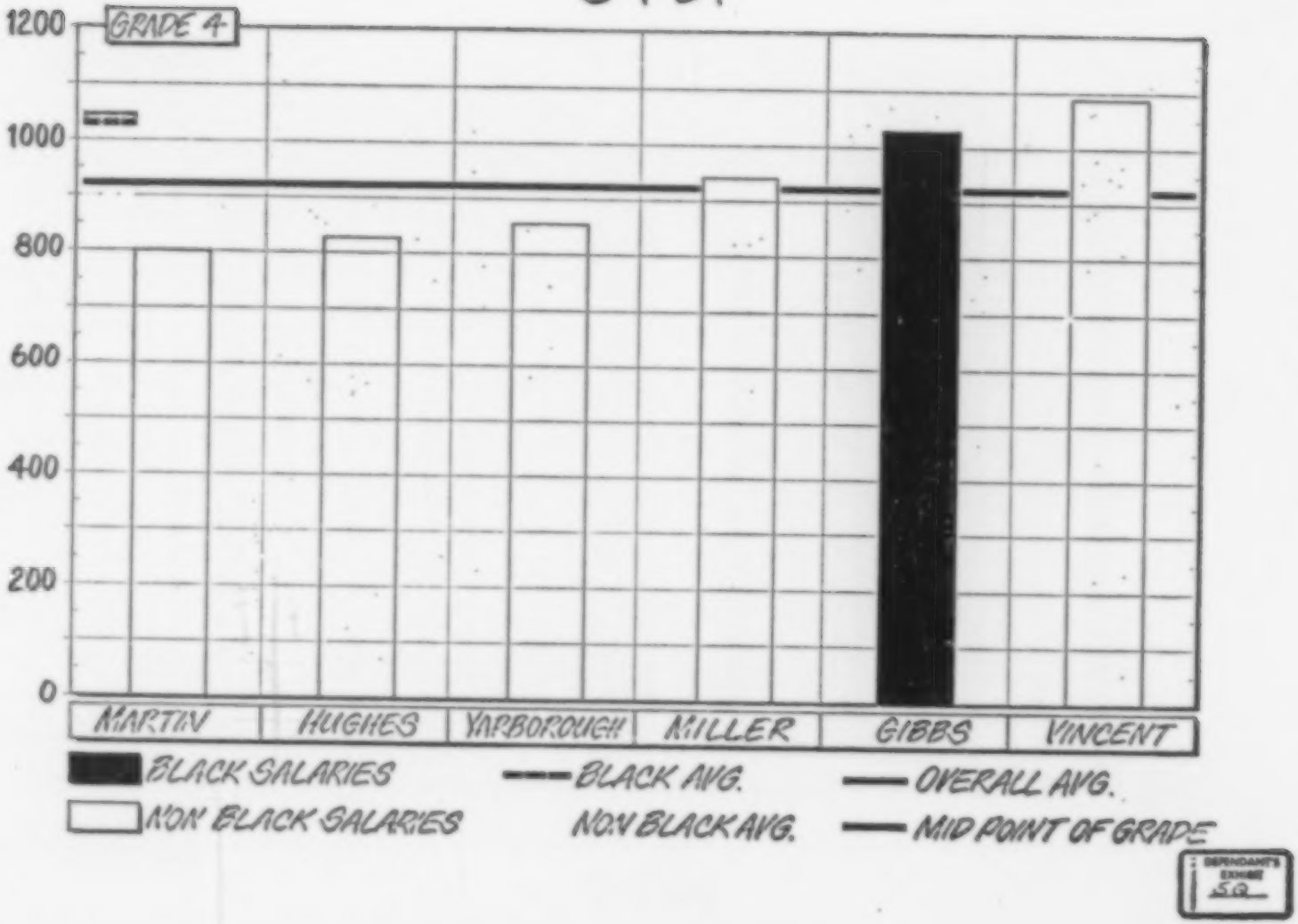
3-1-83


GRADE 5
1200
1000
800
600
400
200
0
Mettles
Paul
Russell
Atkinson
Alexander
Ballew
Bankston
Bird
Chapman
Choate
Dancer
Day
Duckett
Goodwin
Greenfield
Gross
Harden
Matherny
McCarty
Mocio
Perdue
Polk
Reuben
Robshaw
Ryan
Scarborough
Mathis
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-83

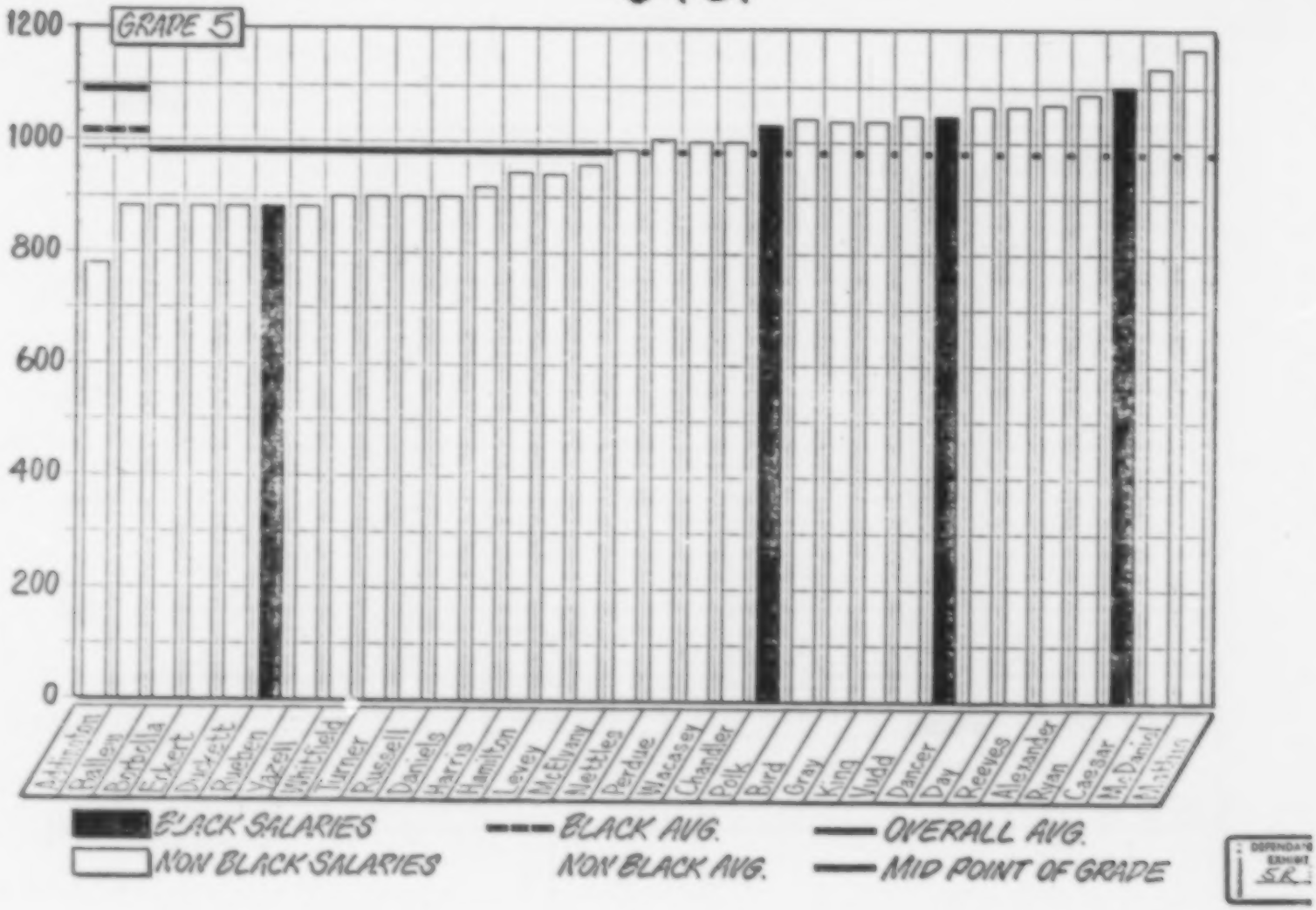

GRADE 6
1200
1000
800
600
400
200
0
MOKSZYCKI
HILL
SMITH
WATSON
PEACOCK
JOHNSON
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-84

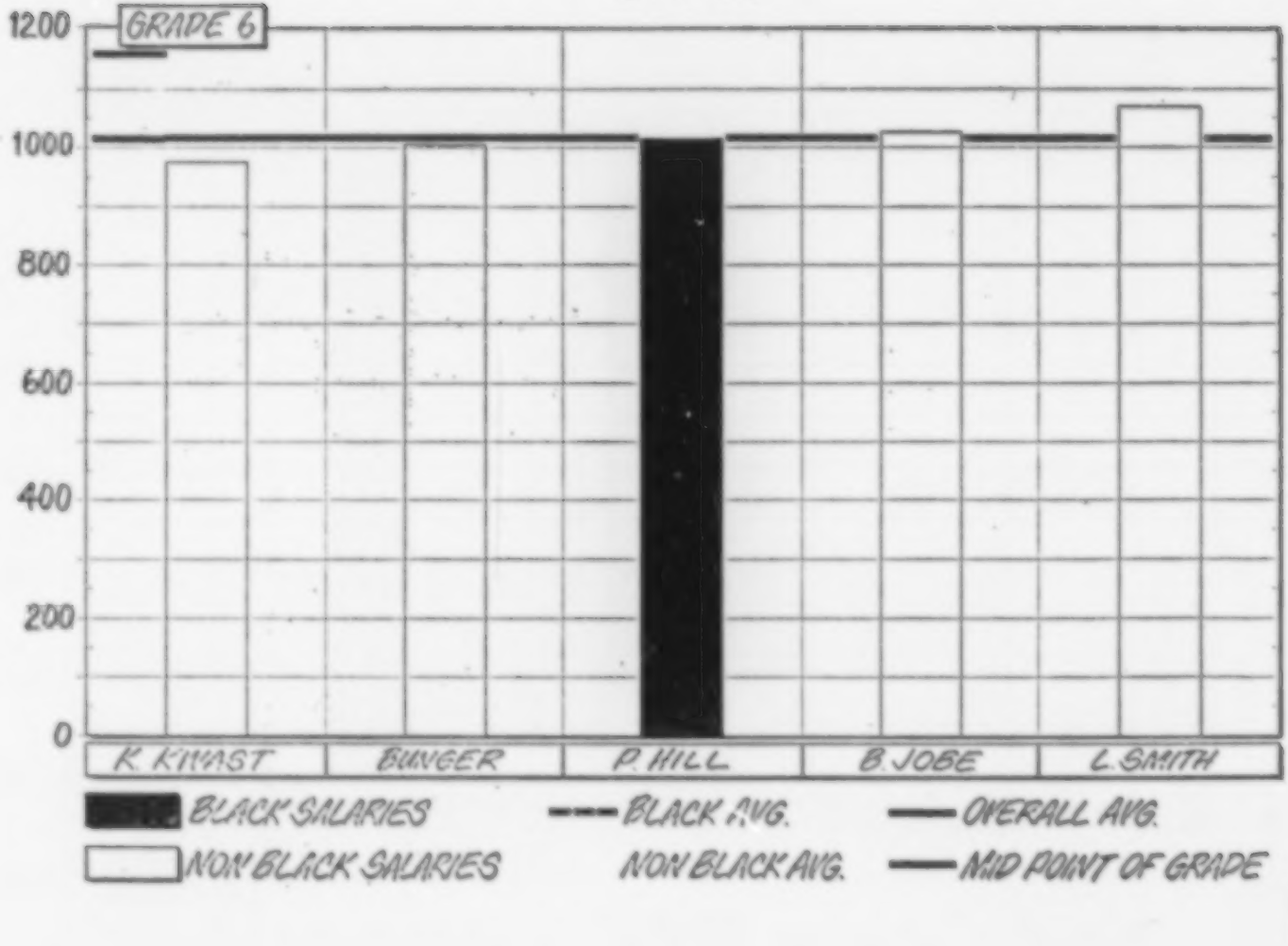


DEFENDANT'S EXHIBIT 45-Q

3-1-84

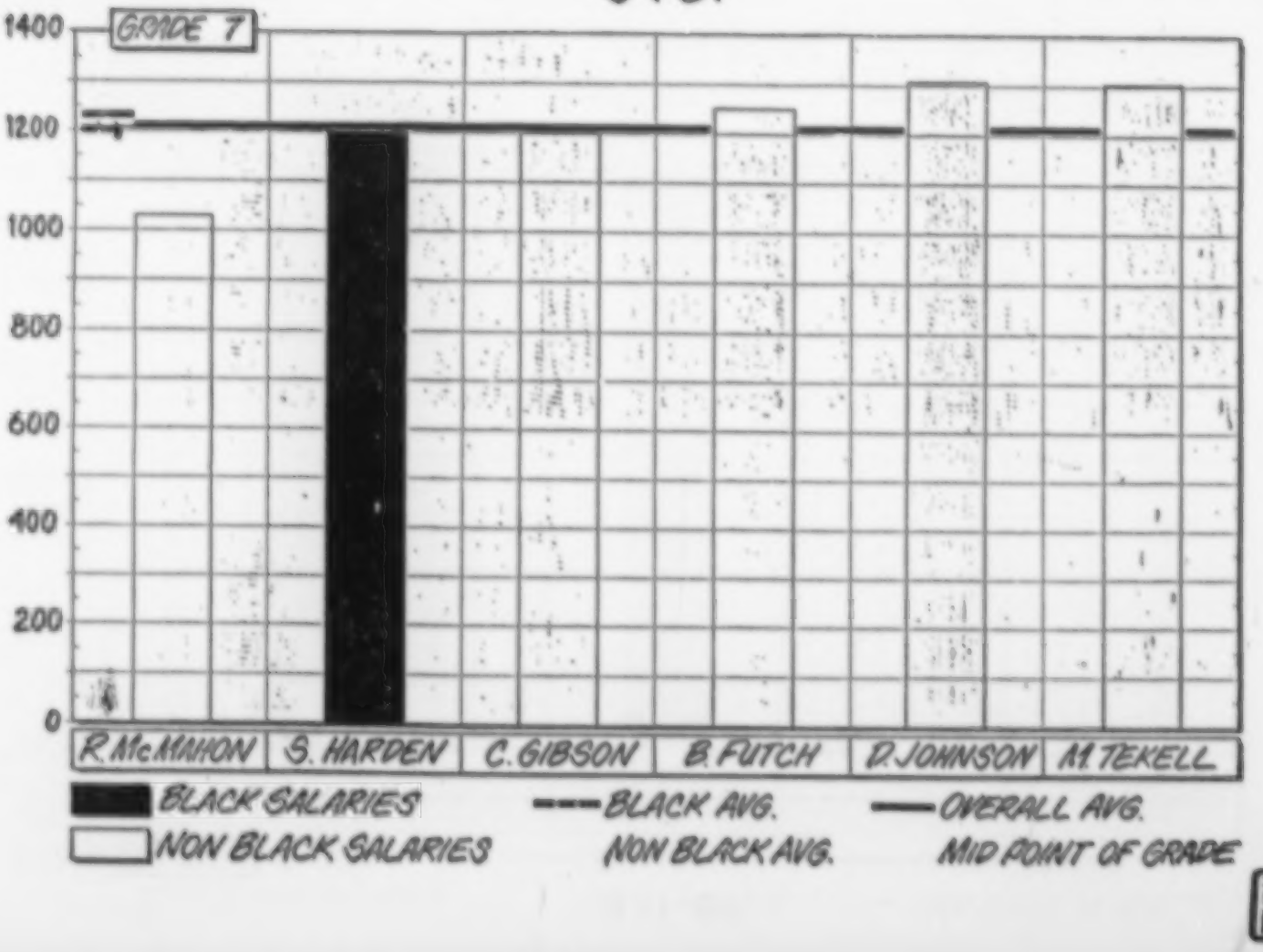

GRADE 5
1200
1000
800
600
400
200
0
A.Hamilton
Hallem
Burbella
Eckert
Durrett
Rueben
Yazell
Whitfield
Turner
Russell
Daniels
Harris
Hamilton
Levey
McElvany
Nettles
Perdue
Wacasey
Chandler
Polk
Bird
Gray
King
Yudd
Dancer
Day
Reeves
Alexander
Ryan
Caesar
M.Daniel
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

3-1-84



DEFENDANT'S EXHIBIT 55

3-1-84


GRADE 7
1400
1200
1000
800
600
400
200
0
R. McMAHON
S. HARDEN
C. GIBSON
B. FUTCH
D. JOHNSON
M. TEKELL
BLACK SALARIES
NON BLACK SALARIES
BLACK AVG.
NON BLACK AVG.
OVERALL AVG.
MID POINT OF GRADE

DEFENDANT'S EXHIEIT 6

[redacted] 81 581 EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-80 GRADE	3-1-80 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
1		000000											000000		
2		000000											000000		
3	CAESAR C	021484	5	1100									030184	5	1100
4	DANCER J	102179	4	572	4	620	5	680	5	880	5	970	030184	5	1050
5	GIBBS T	102179	2	610	2	665	3	869	3	956			030184	4	1031
6	HARDEN S	102179	4	575	4	650	5	715	5	880	5	955	030184	7	1240
7	HILL P	102179	4	595	4	650	4	710	6	880	6	950	030184	6	1017
8	POLK M	102179	4	650	4	650	4	730	5	886	5	966	030184	5	1033
9	RUEBEN S	070182	5	650							5	701	030184	5	864
10	SMOOT L	102179	1	540	1	540	1	585	1	699	1	755	030184	1	660
11		000000											000000		
12	FLAKE A	062380	3	540									090580	3	540
13	GODWIN P	110281	5	607					5	785	5	840	020384	5	840
14	GREEN H	102179	4	537									120779	4	537
15	SANDERS J	042783	3	725									080983	3	725
16	STARKS B	102179	3	550	2	590	2	640	2	765			123182	3	610
17	WATSON C	102179	4	655	4	700	5	765					080781	5	765
18	WRIGHT E	102179	1	560	1	590							090180	1	590
19		000000											000000		
20	ADDINGTON E	102179	4	624	4	519	5	650	5	718	5	779	030184	5	760
21	ALEXANDER K	051980	5	700			5	750	5	924	5	1000	030184	5	1070
22	BALLEW G	080381	5	607					5	761	5	815	030184	5	884
23	BERRY T	102179	7	715	7	815	8	1000	9	1270	9	1375	030184	9	1485
24	BIRD B	030981	3	600					5	850	5	955	030184	5	1045
25	BORBOLLA H	050283	5	693									030184	5	884
26	BRIMER L	102179	4	630	4	690	5	755	7	996	7	1116	030184	7	1206
27	BROWNLEE L	102179	4	650	4	650	6	790	6	979	9	1087	030184	9	1296
28	BUNGER R	032883	3	700									030184	6	1065
29	CHANDLER D	101183	5	1000									030184	5	1000
30	CHANDLER J	102179	3	675	8	800	8	975					061581	8	975
31	COLWELL L	052780	5	650			5	750	7	990	7	1110	030184	7	1220
32	COOKSEY A	102179	8	900	8	900	8	981	8	1189	8	1308	030184	8	1366
33	CULLAR P	102179	4	756	8	835	9	1000	9	1238			030184	8	1238
34	DANIELS K	041381	5	607					5	776	5	846	060182	9	900
35	DAY M	102179	4	660	4	660	5	765	5	919	5	995	030184	5	1065
36	DEGROAT D	062883		1150									030184	5	1150
37	DUCKETT J	011483	5	693							5	692	030184	8	884
38	ECKERT A	042283	3	693									030184	5	884
39	FIELDS K	120583	3	867									030184	5	884
40	FUTCH B	041580	6	875			7	875	7	1084	7	1165	030184	3	650
41	GIBSON C	010984	7	1200									030184	7	1250
42	GRAY M	030184	5	1040									030184	7	1200
43	HAMILTON K	013183	3	700									030184	5	1040
44	HARRIS K	080983	5	850							4	700	030184	5	946
45	HOWARD C	081583		1040									030184	5	920
46	HUGHES M	122381	2	600									030184		1040
47	HUNT J	011083	7	1050					2	726	4	825	030184	4	825
48	JOBE B	050283	6	950							7	1050	030184	8	1250
													030184	6	1025

EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-60 GRADE	3-1-60 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
49	JOHNSON A	113083	8	1200									030184	8	1200
50	JOHNSON D	030380	3	540			4	675		880	6	990	030184	7	1368
51	JUDD K	080883	5	1000									030184	5	1050
52	KING D	011184	5	1040									030184	5	1040
53	KWAST K	090783	5	875									030184	6	975
54	LEVEY J	070883	5	900									030184	5	945
55	MCDANIEL F	050181	2	956						1052	2	1052	030184	5	1136
56	MCELVANY K	071081	2	575					4	765	4	840	030184	5	960
57	MCMAHON R	112982	7	950							7	950	030184	7	1030
58	MADRID M	062183	4	694									030184	3	867
59	MARTIN D	021384	4	800									030184	4	800
60	MATHIS G	011981		825				825	5	990	5	1080	030184	5	1170
61	MILLER V	052682	3	825	3	675					4	875	030184	4	945
62	NETTLES B	052679	2	525	2	675	5	630	5	825	5	900	030184	5	985
63	PERDUE R	102179	4	580	4	625	5	700	5	865	5	935	030184	5	1005
64	REEVES W	102179	4	640	4	640	4	730	4	886	4	975	030184	5	1065
65	REYNOLDS G	102179	7	835	7	835	7	825	8	1128	8	1245	030184	8	1470
66	RUSSELL T	080282	5	710							5	800	030184	5	900
67	RYAN L	092581	5	800					5	952	5	1028	030184	5	1088
68	SESSIONS C	031484	8	1350									030184	6	1350
69	SMITH LINDA	020182	6	900					6	900	6	990	030184	6	1070
70	SNELSON G	072880	5	581			5	700	6	1034	6	1139	030184	9	1465
71	TEKELL M	102179	6	630	5	685	6	885	6	1080	7	1200	030184	7	1305
72	TURNER E	102783	5	900									030184	5	900
73	VINCENT L	102179	4	625	4	660	4	730	4	891	4	1000	030184	4	1090
74	WACASEY B	012181	4	624				623	4	825	4	900	030184	5	1000
75	WHITFIELD T	092280		537				580	4	765	4	830	030184	5	900
76	YARBOROUGH M	090281	4	581					4	718	4	765	030184	4	855
77	YAZELL T	053183	5	750									030184	5	884
78		000000											000000		
79	ANDERS O	102179	4	910	4	908							090580	4	979
80	BALIK R	111281		693									121181		693
81	BANKSTON T	042781	5	607					5	761	5	821	070183	4	821
82	BARBOLLA M	021480	4	598	4	597							050680	5	598
83	BARNES B	110183	5	1000									110483	5	1600
84	BARTO B	102179	4	589	4	623							101080	5	724
85	BARTON K	052181	5	607									081481	5	607
86	BAYUK L	120583	8	1250									021084	8	1250
87	BEEBE D	042081	2	650									062681	2	650
88	BENTON D	102179	8	825	8	900	8	1150					081481	8	1150
89	BOLDING C	050181	5	607					5	735			060482	5	737
90	BROOME A	102179	4	650	4	650							050880	5	650
91	BROWN C	102179	2	590	2	620							041880	2	620
92	BROWN K	102979	4	589	4	640	8	800					121881	8	875
93	BUNDICK B	102179	4	600									102379	4	800
94	CARR P	011882	6	593									012982	6	955
95	CARSON S	011180	4	640	4	640	4	760	8	1029	8	1134	082683	8	1184
96	CARTER K	121780		1040									031581		1040

EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-80 GRADE	3-1-80 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
97	CHAMBLISS C	092280	2	590			3	650					042881	5	650
98	CHOATE N	120182	5	693							5	692	061983	5	745
99	COOPER L	033180	2	600			6	745	7	957			111981	6	957
100	CRETSINGER M	102179	3	585	3	615	4	700	4	946			081382	4	1060
101	CUMMINGS L	012781	5	653			5	692	5	908			061882	5	1019
102	CUREAU L	061583	7	1135									111583	7	1135
103	DAVENPORT R	112583	7	1200									120683	7	1200
104	DENNIS L	051580	1	607			2	605					031281	1	607
105	DENTON B	121779	4	589	4	588	5	640					042481	5	641
106	DESILETS L	011382		780									011383		780
107	DUCKER K	011480	3	540	3	540							061380	3	595
108	DUNHAM F	051980	5	581									012281	5	641
109	FRIDELL M	102979	3	530									011180	3	530
110	GILLILAND M	102179	5	650	5	650							121580		775
111	GRAY L	102179	4	620	4	670							071180	5	695
112	GREENFIELD L	060182	5	693							5	744	060683	5	745
113	GROSS D	123081	5	910					5	908	5	952	120182	5	953
114	HALL D	062281	5	725					5	908			062382	5	908
115	HARR V	102179	4	650	4	695							100180	5	695
116	HEFNER S	102179	6	680	4	680	4	790	4	939			020483	4	1005
117	HESTER R	102179	4	630	4	730	5	830	5	913			013082	5	913
118	HINTON L	102179	4	630	4	630	5	775	5	957			071582	5	957
119	HOUSER L	022282	5	725					5	725			011283	5	820
120	HOWARD CARLA	010280		850		850							031480		850
121	HOWL P	010281	2	650			2	650					040261	2	650
122	HYDE R	102179	1	537	1	580							082980	1	633
123	JENKINS J	031681	5	607									092561	5	693
124	LANIER P	102179	4	605	4	655							043080	4	655
125	LEAVITT G	102179	8	820									021560	8	865
126	LEE K	060280	5	581			5	675					091581	5	705
127	LIPFORD W	102179	1	624	1	623	4	700					041481	4	700
128	LITTLE L	031483	6	850									082583	6	900
129	LOVE D	102179	5	690	5	755	5	825					022681	5	825
130	MCCARTY J	100980	5	700			5	725	5	880	5	942	042183	5	942
131	MCCAULEY V	020981	5	650			5	649					091681	5	705
132	MCKINNEY J	102179	4	635	4	670							062380	5	710
133	MAYBERRY P	110981	5	750					5	875	5	935	042583	5	935
134	MIDDLETON G	032480		693									061780		693
135	MILLER M	040582	7	1125							8	1235	100182	7	1235
136	MOCIO D	122181	5	823					5	822	5	865	061783	5	919
137	MOKSZYCKI P	062381	2	650					2	781	6	900	041483	6	900
138	MOORE C	111780	2	537									123160	2	537
139	MOTT J	100680	5	581			5	580					021281	5	581
140	NOBLE C	102179	3	630	3	630							052360	3	630
141	PAUL J	051982	5	780				840			5	825	101483	5	875
142	PEACOCK E	102179	4	680	4	745	4	820	6	985	6	1060	022583	6	1060
143	PHELPS P	121283	6	1430									020184	6	1430
144	PRIDGEON C	022580	4	660	4	660							042980	5	660

EMPLOYEE GRADE AND SALARY HISTORY

NO.	EMPLOYEE NAME	START DATE	START GRADE	START SALARY	3-1-80 GRADE	3-1-80 SALARY	3-1-81 GRADE	3-1-81 SALARY	3-1-82 GRADE	3-1-82 SALARY	3-1-83 GRADE	3-1-83 SALARY	END DATE	END GRADE	END SALARY
145	RICE D	111780	2	590			2	590					022081	2	590
146	RIDLEY H	111583	3	820									022784	3	820
147	ROBERSON R	091180		633				666		778		848	022684		936
148	ROBERTS C	102179	6	760	6	760	6	955	7	1166			010183	7	1271
149	ROBSHAW N	100681	5	725					5	863	5	925	081963	5	925
150	SCARBOROUGH P	040780	3	550			4	650	5	864	5	944	112583	5	1020
151	SCHELL L	102179	4	600			5	735					091581	5	735
152	SCHMIDT C	102179	6	675	6	675	7	800	7	985			011483	7	1100
153	SCHWINKENDORF J	092881	5	750									103081	5	750
154	SMITH J	061681	5	607									080781	5	607
155	SMITH LISA	110183	5	850									110483	5	850
156	SPILLMAN D	102179	4	600	4	636							000000	5	636
157	STALLONS D	102179	4	635	4	635							123180	4	725
158	STOCKTON J	111681	3	630					3	608			052882	3	745
159	STRITTMATTER L	030182		867									062482		867
160	VANDYKE C	050580	3	560			3	650					071581	3	650
161	WARREN V	030981	2	600					6	900	7	985	120983	7	1075
162	WATSON P	081081	4	710					6	847	6	915	113083	6	1025
163	WEATHERLY P	102179	7	800	7	850	7	925					063081	7	925
164	WEATHERS L	102179	4	600									011080	4	600
165	WERNER C	102179	4	650	4	650							050860	5	650
166	WHITE G	092881	4	800					7	960	7	1095	060983	7	1095
167	WHITE S	102179	8	900	8	900							100960	8	900
168	WHITEHEAD T	092881	5	607									101681	5	607
169	WILSON S	070180		775				800					010882		963
170	JOYCE R	102179	1	641	1	519	2	605	2	718	2	718	030184	2	760

DEFENDANT'S EXHIBIT 7

Fort Worth

POPULATION BY ETHNIC IDENTITY FOR FORT WORTH AND SELECTED AREAS 1980

Source: 1980 Census of Population

FORT WORTH		1980 Population	% of Total
White		265,428	68.9
(White	216,732)		56.3
(Spanish	48,696)		12.6
Black		87,723	22.8
Other		31,990	8.3
(Amer.Indian, Eskimo & Aleut	1,227)		0.3
(Asian & Pacific Islanders	2,340)		0.6
(Other	28,423)		7.4
Total Population		385,141	

TARRANT COUNTY		1980 Population	% of Total
White		711.965	82.7
(White	644,333)		74.8
(Spanish	67,632)		7.9
Black		101,183	11.8
Other		47,732	5.5
(Amer.Indian, Eskimo & Aleut	3,050)		0.4
(Asian & Pacific Islanders	6,465)		0.7
(Other	38,217)		4.4
Total Population		860,880	

FORT WORTH METROPOLITAN AREA
(Tarrant, Johnson, Hood, Parker & Wise Counties)

White		862,010	84.7
(White	788,460)		77.5
(Spanish	73,550)		7.2
Black		103,670	10.2
Other		51,750	5.1
(Amer.Indian, Eskimo & Aleut	3,480)		0.3
(Asian & Pacific Islanders	6,772)		0.7
(Other	41,498)		4.1
Total Population		1,017,430	

FORT WORTH/DALLAS SMSA
(Standard Metropolitan Statistical Area)

White		2,373,962	79.8
(White	2,124,349)		71.4
(Spanish	249,613)		8.4
Black		419,272	14.1
Other		181,644	6.1
(Amer.Indian, Eskimo & Aleut	11,225)		0.4
(Asian & Pacific Islanders	24,549)		0.8
(Other	145,870)		4.9
Total Population		2,974,878	

EXHIBIT

B

SUPREME COURT OF THE UNITED STATES

No. 86-6139

CLARA WATSON,

Petitioner

v.

FT. WORTH BANK & TRUST

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 22, 1987

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA B. WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF FOR THE PETITIONER

ART BRENDER*
FRANK P. COLOSI
BRENDER, CASEY & COLOSI
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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QUESTION PRESENTED

Whether an employer's practice of committing employment decisions to the wholly subjective discretion of its supervisors which adversely affects minority employees may be tested under the disparate impact theory of proof of employment discrimination recognized by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)?

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OPINIONS BELOW

The opinion of the Court of Appeals (J.A. 204) is reported at 798 F.2d 791 (5th Cir. 1986). The opinion of the District Court (J.A. 190) is not reported.

JURISDICTION

The judgment of the Court of Appeals (J.A. 253) was entered on August 27, 1986. A timely suggestion for rehearing *en banc* was denied on September 30, 1986. The petition for a writ of certiorari was filed on December 29, 1986, and was granted on June 22, 1987. (J.A. 311). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Sec. 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. secs. 2000e et seq., provides:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sec. 16(Q) of the U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978) (codified at 29 C.F.R. secs. 1607.1 et seq.), provides:

> *Selection Procedure*. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probation-

ary periods, and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

STATEMENT

In August, 1973, Clara Watson sought the position of teller at the Fort Worth Bank and Trust.[1] (J.A. 4-6). She was hired not as a teller but as a proof operator and assigned to duties that did not deal with the public.[2] (J.A. 5-6). The Bank is the closest bank in Tarrant County to the largest black population areas in Fort Worth.[3] Approximately half of the Bank's customers were black. (R. I 9-11). At the time Clara Watson went to work for the Bank, none of the Bank's four black employees (out of over sixty non-exempt employees) were employed in any job which dealt with the public.[4] At the time Clara Watson was advanced to teller at the Bank in January, 1976, she was the first black to ever hold that position.[5] No black had ever been a

---

[1] Formerly the State Bank of East Fort Worth, the Bank's name became Fort Worth Bank & Trust in 1975. In 1978, it became part of a bank holding company, Fort Worth Bancshares, that was in turn owned by Southwest Bancshares, Inc. It is presently owned by MCorp, a bank holding company, and its name has again been changed to MBank East. The location of the Bank has not changed since 1975. (Shipp Deposition, pp. 10-11).

[2] Watson was a high school graduate and had nine hours of college credit in business related courses. She had worked for Montgomery Ward department store as a cashier for nine years before being employed by the Bank. (J.A. 190).

[3] In 1980, the City of Fort Worth was 22.8% black, the vast majority of that black population being concentrated in the near southside and Stop Six areas of Fort Worth. Both areas were within three miles of the Fort Worth Bank & Trust. (R. I 9-11; Shipp Deposition, pp. 11-14).

[4] The four employees included a black porter, kitchen attendant, and two check printers who worked in the basement. (J.A. 5-6).

[5] Her advancement came only after an EEOC complaint had been filed by another bank employee. (J.A. 6). When she first approached him about the bank teller position, Clara Watson stated that Gary Shipp, bank vice-president for personnel, replied, "I don't know girl, it's a big responsibility" and "It's a lot of money, you know, for blacks to have to count." (J.A. 7).

director or officer of the Bank. No black had ever served in a managerial capacity in the Bank through the trial of this cause. (J.A. 50-51). At a time when the Bank's nonexempt employees numbered close to eighty, no black had ever served as a supervisor at the Bank.[6] (J.A. 50-53). After serving five years as a motor bank teller and as a commercial teller inside the Bank lobby, Clara Watson sought promotion in February of 1980 to a supervisory position as supervisor of the lobby tellers. (J.A. 7, 30-38). The position was also sought by another black teller, Sylvia Harden. (J.A. 18-19). Richard Burt, a white male, was selected for the job. (J.A. 12-13, 18-19).[7] After Burt's selection as lobby supervisor the position of motor bank supervisor opened, and both Watson and Harden also sought that position. Pat Cullar, a white teller who had no prior supervisory experience although she had previous banking experience was selected for the promotion. Cullar had worked at Fort Worth Bank & Trust for two years at the time she was promoted to the supervisory position in February of 1980. (J.A. 192).

In order to assist Richard Burt as lobby teller, the Bank selected Clara Watson. (J.A. 14-16, 107-09, 122-23). The move did not involve a change in pay or title. She performed these duties for one year when in February of 1981, Richard Burt was again promoted, thus opening up the position of lobby supervisor. (J.A. 18). Clara Watson again applied together with Pat Cullar (a white female), Sylvia Harden (a black female), Kevin

---

[6] After the court had certified this matter as a class action, the Bank advanced a black, Sylvia Harden, to the position of assistant to the motor bank supervisor, but her duties did not include evaluations of other employees. The Bank considered evaluation, hiring and firing duties as the prerequisites to the title of supervisor. (J.A. 50-53, 107-09, 122-23).

[7] Burt, who had been employed at the Bank since 1976, had been broken in as a teller by Clara Watson in the motor bank and then advanced to an assistant supervisor and then supervisor of the bookkeeping operation of the Bank. Prior to his employment by the Bank, Burt had no previous banking or supervisory experience, having worked only a few part-time jobs since his graduation from high school. (J.A. 13-16, 40-41, 115, 133-34).

Brown (a white male), and Donna Love (a white female). The Bank selected Cullar, the motor bank supervisor. (J.A. 18-19, 122, 130-37). This of course opened up the motor bank supervisor position and once again Watson, Harden and Brown applied for that position. (J.A. 18-19, 112-15, 122). The Bank chose Kevin Brown. (J.A. 18-19, 130-37). Brown had been an employee of the Bank for a little over a year, six months of that time as a part-time teller in the motor bank. A recent high school graduate, he was twenty-years old and had no prior banking experience. (Pl. Ex. 4, R. I 28-29). His work experience consisted of seven months as a salesperson in a department store and four years seasonal work as a cashier at Six Flags Over Texas Amusement Park which included some work supervising teenage seasonal employees. (J.A. 193).

Having been denied this fourth promotion, Clara Watson filed a charge with the Equal Employment Opportunity Commission which resulted in this lawsuit.

The Bank vested the discretion in its all white supervisory and management personnel to make hiring and promotional decisions based on purely subjective considerations. The Bank's hiring, promotional and salary procedures were described by Gary Shipp, senior vice-president of the Bank in charge of personnel. Shipp testified that hiring decisions are made by departmental supervisors who submit their decisions to Shipp for formal approval. (J.A. 64-65, 116-17, 119-21, 193). Shipp personally interviews some of the applicants but makes final hiring decisions only for those persons who would be working directly under his supervision. (J.A. 64-65, 116-17, 119-21, 194). During all periods relevant to the case, Shipp had final authority over all personnel matters. (J.A. 116-17, 119-21, 194). Applications were accepted from the usual sources including walk-ins, newspaper ads and the Texas Employment Commission. (J.A. 142, 147, 149).

Although standard application forms were used by the Bank which did not contain the race or sex of the applicants, the applications were coded by Mr. Shipp's secretary after the applicant had been interviewed to indicate each applicant's race

and sex. (J.A. 124). This information was obtained, according to Mr. Shipp, in order to fill out the job applicant flow log, and "so we'll know". (J.A. 124).

Performance evaluations are made by the supervisors for those employees under their authority. (J.A. 52-62, 194-96). Since 1978, employees have been given yearly written evaluations which are completed by their supervisors on the anniversaries of the employees' hire dates. Salary increases are then calculated on the basis of the performance ratings. (J.A. 52-62, 125-29, 194-95). The salary review committee, which consists of the president or executive vice-president of the Bank, the officer in charge of personnel and the senior operations officer,[8] reviews the evaluations of the supervisors. Only occasionally is a change made in a supervisor's rating. (J.A. 58, 66-75, 125-29, 195). Gary Shipp was a member of the salary review committee during the entire period relevant to the case. (J.A. 195).

While salary evaluations did involve the use of a salary evaluation form and a rating system, hiring decisions were left to the discretion of the supervisor, except for basic skills such as typing that might be needed for a particular position. (J.A. 121-22).

Promotions were handled in a similar fashion. Prior to 1979 job openings were not posted. (J.A. 121). Beginning in 1979, however, the Bank adopted a posting procedure as well as a preference for hiring from within the Bank before seeking outside applicants for other than entry-level positions. (J.A. 121). The posting would remain open for three days during which time the supervisor responsible for the position would accept applications for the position. The supervisor would then make the promotional decision and submit it to Shipp for formal approval. (J.A. 120-22). Shipp always approved the supervisor's choice. (J.A. 131-33, 156, 158, 161-62, 195).

---

[8] Shipp was the senior operations officer during the time period considered in the statistical studies, and the personnel officer until September, 1983.

The criteria by which a person was judged suitable for hiring or promotion were left solely to the discretion of the supervisor in charge of making the decision, and the personnel officer. (J.A. 131-35, 139-40, 156, 161-62). There was no formal or even informal procedure for rating candidates for particular positions. (J.A. 135, 139-40). The criteria for promotion were described by Bank supervisors Richard Burt (Burt was the supervisor who made three of the decisions not to promote Watson), as follows:[9]

> Question (By Mr. Brender): . . . But you mentioned experience, leadership, previous supervisory experience and ability to get along with others?
>
> Answer (By Mr. Burt): Those are the things that come to my mind. But in any decision like that, there's maybe fifty or a hundred things that really enter into it. (J.A. 135).

When pressed by the Court to determine whether or not complaints about Clara Watson's performance had entered into his decisions not to promote her, Burt reiterated his description of the discretionary process as follows:

> Answer (by Mr. Burt): I think that's a factor. I wouldn't say that that was the determining factor, but it is—you know, there is a lot of things that go into making a decision and that would be one of them. (J.A. 141).

At trial Watson presented anecdotal and statistical evidence as to the adverse treatment she received as well as upon her claim that the wholly discretionary decisionmaking process impacted adversely on blacks as a whole. Watson's attempt to show pretext was frustrated by the shifting use of vague and subjective criteria in the selection process.

The Bank had advanced Burt to lobby supervisor in 1980 based, at least in part, on his supervisory experience gained at the Bank.[10] (J.A. 111-15). The Bank then promoted Cullar to

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[9] This quoted exchange occurred when Burt was cross-examined concerning the reasons for his decision to promote Kevin Brown over Clara Watson for the motor bank supervisor position in February of 1981.

[10] Burt had had no supervisory or banking experience before his employment with the Bank.

motor bank supervisor, over Watson, in part because Cullar had greater banking experience than Watson, despite the fact that Cullar had only been at the Bank approximately two years and like the Petitioner, had no supervisory experience. (J.A. 108-22). In February, 1981 the Bank promoted Brown over Watson because, while he had far less banking experience than Watson, he had prior supervisory experience. In all of these promotion decisions "numerous other factors" were also included. In each instance, the Petitioner was faced with the same vague standards in her attempt to show pretext for her individualized claim. (J.A. 108-22). Rebutting the claim that she did not get along with employees, Watson showed that one such employee used as an example by the Bank, Lena Gray, had had problems with numerous people at the Bank, including Cullar and Burt, and ultimately resigned. In addition Watson showed that Cullar had received a rating of three out of a possible nine in the supervisor/co-worker relationship category on her last annual evaluation prior to being promoted, while Watson was given a six in the same category. (R. III 92; Shipp Deposition, pp. 49-50; Class Certification Hearing Transcript, p. 85).

Watson rebutted the Bank's claim that Brown's prior supervisory experience was a factor by pointing to her own supervisory experience as Burt's assistant and her eight years overall banking experience, and by observing that Burt, Hazel Cretsinger and Joy Chandler (all white) had all been promoted to supervisor positions without prior supervisory experience. (J.A. 114-15). To demonstrate her own leadership ability, Watson testified to her alertness in apprehending two muggers who had attacked an elderly lady, had stolen her social security check and were thwarted by Watson in their attempt to cash the check.[11]

---

[11] Watson sensed something was wrong when the two persons (one male and one female) presented the stolen social security check at the motor bank window. When she insisted on more identification, the pair sped from the drive-in window and Watson pursued and obtained the license plate number of their car. Watson was the only witness able to identify the pair. She testified at their trials and both were

Finally, Watson showed that Brown was poorly suited for his job. His employment evaluation completed, six months after his promotion, by Cullar found his performance only "close to being competent." (Pl. Ex. 4, R. I 29). His letter of resignation in December of 1981 questioned whether poor communication with the supervisor, inadequate training or his personality had caused him to last only ten months on the job. (Pl. Ex. 4, R. I 2963). The District Court found that the Bank had legitimate nondiscriminatory reasons for its promotions and denied Watson's disparate treatment claims.[12]

Thus Clara Watson turned to impact analysis in order to show that this subjective system with its fifty to one hundred different criteria that went into the decisionmaking process adversely impacted upon blacks, such as herself, subjected to such selection procedures. Since the employee selection procedures involved discretionary subjective evaluations by supervisors in both hiring and promotion, statistical studies of

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convicted and sent to the penitentiary. Watson was harassed by the family and friends of the muggers who lived a few blocks from her residence. She was pursued on one occasion by the thieves' friends and her yard was burned. (R. I 108-09).

[12] The District Court incorrectly found Brown "was available immediately" to assume the supervisory position while Watson was out on sick leave in 1981 and subsequently underwent foot surgery. (J.A. 197). Actually, that conclusion was not so. As the Fifth Circuit correctly determined, the Bank did not advance Watson's medical problems as a reason to prefer Brown over Watson. Watson had injured her foot while working at the Bank. (J.A. 23). At the time the promotion occurred, Watson's medical condition was such that she could still not stand for eight hours and carry bags of coins, etc., as the teller's job required, but she could have assumed duties as a supervisor which would not have been as strenuous. Although, at the time of the promotion decision, Watson's condition appeared as though it would heal quickly, her condition worsened in subsequent weeks, necessitating surgery in the spring of 1981. (R. I 58-59, 72-74, 186-87).

both were done.[13] The Petitioner presented Dr. Tom Marshall, a political science professor at the University of Texas at Arlington, who taught both undergraduate and graduate statistical courses. Both sides agreed to a statistical data base so that no question was raised about the authenticity of the data entered in the data base. Included in the data base were the name, position, salary grade, salary, education and experience levels of each person who had been employed at the Bank during the period covered by the class from October 21, 1979 through March 1, 1984. The Respondent presented no statistical study but did have Mr. Shipp testify about some of his opinions concerning what the data base reflected.

Clara Watson's analysis of hiring statistics indicated that over the four-year period covered by the class five hundred thirty-three (533) whites and one hundred forty-four (144) blacks applied for employment at the Bank. Seventy-nine (79) whites and five (5) blacks were hired. The hiring rate for blacks was 3.5 percent over the four-year period while the hiring rate for whites was 14.8 percent, both figures being statistically significant, using the chi-square test, at 0.001. (J.A. 76-81, 255). The Bank's position that only two weeks' worth of applications were actually considered for employment, while shown to be in error,[14] was nevertheless analyzed. Analyzing the Bank's position,[15] Watson's statistical test showed that the black rate of hire would be 8 percent and the white rate of hire 28 percent.

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[13] Since this case proceeded as a class action and the Petitioner was originally certified as a class representative of a broader class, salary discrimination studies were also performed.

[14] Several hirees, including Shipp's secretary, had applications submitted well in advance of the two week cut-off. The two week cut-off was not mentioned in deposition or at the Class Certification Hearing, and was first brought up in the trial on the merits. R. II 57-66; J.A. 119-20).

[15] That is, analyzing only applicants who had filed their applications within the two weeks before the Bank actually hired someone to the position.

Under the chi-square test these rates were significant at the 0.01 level. (J.A. 85-88, 280).

Although annual evaluations were in themselves determinative of salary increases, they also entered into at least to some extent the promotion decision. (R. III 50). Thus, the evaluations for each and every person represented in the statistical sample (the statistical sample included only nonexempt positions, and these did not include any officers) were examined to determine whether or not blacks were being evaluated at a lower rate than whites. The Bank had instituted annual evaluations on the anniversary date of each employee, at which time the employee's supervisor filled out a performance evaluation form, evaluating the employee on a scale that ranged from 0 to 7, to 0 to 10, depending upon the characteristic being rated. (Pl. Ex. 1-4, R. I 29, 63). The total points available were one hundred four. Progressively increasing annual salary increases would be given depending upon the performance evaluation rating. A rating of from fifty-three to sixty-two would merit a 6 percent increase whereas a rating from ninety-eight to one hundred four would merit an 11 percent increase. *Id.* Professor Marshall examined every evaluation of every employee at the Bank during this four-year period. His study revealed that whites had an average evaluation score of better than ten points higher than blacks. (J.A. 91-92, 273). Each of the evaluation studies was statistically significant at levels ranging from 0.05 to 0.001. *Id.*

Since nonexempt employees were placed in salary grades according to the jobs they were performing, an average increase in grade evidenced the promotion rate of blacks and whites. (J.A. 95-96, 98). Dr. Marshall's studies showed that whites increased in grade at an average of 0.53 grades per year while blacks increased 0.18 grades per year. (J.A. 96, 276). Over the four-year period encompassed by the study, blacks were a full 1.16 grades below whites. (J.A. 97, 276).

Realizing that averages can be deceptive where education and experience levels differ, Dr. Marshall performed a multiple regression analysis on the average increase in grade and on the

final grade achieved controlling for education and experience. Dr. Marshall's regression study included employee evaluations, although this inclusion would greatly assist the Bank since evaluations were lower for blacks by a statistically significant ten points per evaluation. (J.A. 98-103). Regression analysis showed that, controlling for education and the entry grade into which a person was originally placed when hired, race was a statistically significant factor, whites advancing at a rate 0.6 grades per year faster than their black counterparts. (J.A. 98-100, 277). The significance of this regression is that blacks hired by the Bank were on the whole better educated and had more experience than their white counterparts. Looking only at the averages, Petitioner's study (J.A. 95-96, 276) indicated blacks were disadvantaged by 0.35 grades per year, but when taking into consideration their education and original assignment, their detriment was almost twice as great. (J.A. 98-100, 277). Computing a similar regression for the final grade achieved by blacks at the Bank and controlling for, alternately, and then in combination, education, experience, and evaluations, blacks were again found to be from 1.22 to 1.38 grades lower than their white counterparts. (J.A. 100-03, 277). Each of the above figures was statistically significant at the 0.001 level. *Id.* Not surprisingly, Dr. Marshall's multiple regression studies of compensation at the Bank exhibited a similar racial bias which was also statistically significant. (J.A. 103-04, 277).

Dr. Marshall summed up the result of his individual studies when looked at collectively, stating:

> . . . [T]hey are race-related differences, most of them significant in all of those variables, both in the hiring part and in the treatment of present employees. . . . You get a consistent pattern of race related differences, depending on how many people you have and what the—the number of characteristics you are talking about. Sometimes it is stronger than others, but it is very, very consistent in one particular direction; yes, sir. (J.A. 104-05).

Watson's statistical studies buttressed her anecdotal evidence concerning the effect on herself and other blacks of the Bank's entirely subjective decisionmaking processes. The

same white supervisors who hire only 3.5 percent of the black applicants while hiring 14.8 percent of the white applicants, rate blacks ten points lower than whites on the average on annual salary evaluations, and promote blacks from one salary grade to another at a slower rate (-0.6 salary grades per year) as compared to their white counterparts. Over a four-year period blacks are better than one and one-third (1.38) salary grades below their similarly qualified white counterparts. (J.A. 72-73, 77-78, 91-92, 98-103, 107-08, 161, 194-95, 255, 273, 274). Nevertheless, the promotion criteria comprised fifty or one hundred factors which included no standards, instructions, or formal rating procedures. (J.A. 134-35, 161).

When confronted with Petitioner's statistical study, vice-president Shipp acknowledged his previous observations that blacks appear to perform as well as their white counterparts in the Bank. (J.A. 176). When asked to explain why blacks had lower average evaluations, Shipp could not explain this disparity:

> Question: (By Mr. Brender) Can you explain why blacks have lower average evaluations than whites do?
>
> Answer: (By Mr. Shipp) Can I explain why? No, I can't. (J.A. 175).

When further confronted with white hiring rates that were three times that of blacks, Mr. Shipp attributed the adverse impact to some quirk in record keeping. (J.A. 176-77).

The Petitioner, in the Pretrial Order, her Post Trial Brief, and her Motion for New Trial and for Additional Findings of Fact, requested that the Court review the evidence under the disparate impact model. (R. 283, 320, 409) The District Court refused to do so. The Court of Appeals, following *Pouncy* v. *Prudential Ins. Co.*, 668 F.2d 795 (5th Cir. 1982), held that disparate impact analysis was not applicable. 798 F.2d at 797. Clara Watson duly perfected her petition for writ of certiorari from this Court to review that decision.

SUMMARY OF ARGUMENT

This Court's decision in *Griggs* v. *Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), did not restrict

disparate impact analysis to objective tests. The legislative history and the congressional choice not to so restrict disparate impact analysis with the adoption of the 1972 amendments to Title VII, 42 U.S.C. secs. 2000e et seq., clearly demonstrated the congressional resolve to combat discriminatory effects whether they be from subjective or objective procedures. Legislative history of the 1972 amendments demonstrates Congress' adoption of then current case law and EEOC Guidelines that had unmistakably subjected all elements, objective and subjective, of the total employee selection process to disparate impact analysis. The EEOC Guidelines, which the *Griggs* Court held were entitled to great deference, define the selection procedure subject to a disparate impact analysis to include "the full range of assessment techniques . . . from traditional paper and pencil tests, performance tests, training programs . . . through informal or casual interviews and unscored application forms." U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295, 38308 (1978) (codified at 29 C.F.R. sec. 1607.16(Q). To deny the Petitioner and others the right to test subjective decisionmaking procedures by the disparate impact model will penalize employers who have conscientiously adopted objective job-related practices and encourage employers to resort to subjective selection practices which more readily lend themselves to violations of Title VII. Unlawful discrimination embedded in subjective decisionmaking processes may be impossible to prove under the alternate *McDonnell Douglas* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) test because covert discrimination may then be hidden among dozens of possible considerations, all facially neutral, and far too numerous to possibly rebut. To permit a subjective but discriminatory employee selection system to remain in effect, shielded from disparate impact analysis, but not susceptible to proof of intentional discrimination, would create an ad hoc discriminatory quota system contrary to the clear purpose of Title VII to eliminate the effects of racial discrimination in the workplace. Finally, to require an employer to validate a subjective selection process would not

unduly burden the employer, in light of the Petitioner's initial and heavier burden of demonstrating a statistically significant disparate impact and the logic requiring the employer, with its greater knowledge of the whys and wherefores of its practices, to produce justification for their continued use.

ARGUMENT

The Petitioner, Clara Watson, clearly showed that there existed at Fort Worth Bank & Trust, during her tenure with the Bank, a selection system, both for hiring and promotion, which consisted purely of white supervisors whose hiring, promotion, and salary decisions were wholly discretionary and (with the exception of salary evaluations) were not guided by any criteria whatsoever. The total selection process resulted in no black ever advancing to the rank of supervisor, much less officer, of the Bank. Despite the fact that the Bank was located very close to Fort Worth's two main black population concentrations and approximately one-half of the Bank's customers were black, only five (5) of the one hundred forty-four (144) blacks who applied for employment were hired during the four-year period examined by the Petitioner in her statistical study. During that same period, seventy-nine (79) out of five hundred thirty-three (533) white applicants were hired. The 3.5 percent hiring rate for blacks was less than one-third of the 14.8 percent hiring rate for whites. Annual evaluations of non-officer personnel showed that blacks, on their first performance evaluations, averaged a score of sixty-three (63), while the average score for whites was seventy-eight (78). The second, third and fourth year evaluations yielded similar results, all of them statistically significant. Blacks progressed an average of .18 of a salary grade per year as opposed to .53 of a grade for whites, and when multiple regression analysis took into consideration educational background and prior banking experience, blacks were found to progress .6 of a grade per year more slowly than whites. Taking into consideration education, experience and even the flawed evaluation scores, blacks, at the end of the four-year period, were an average 1.38 salary grades behind their white counterparts. Multiple regression analyses of salary,

controlling for the same variables, indicated the final salary of blacks, at the end of the period, fell forty-five dollars and ninety-eight cents ($45.98) a month below what was paid their white counterparts.

The Respondent presented no statistical expert at trial, performed no analysis on the hiring statistics or promotion statistics, and only weakly attempted to question the Petitioner's salary statistics. Presenting no statistical expert, the senior vice-president and personnel officer for the Bank, Gary Shipp, pointed out some of the characteristics of the salary figures earned by personnel at the Bank without preparing or presenting any calculations or mathematical conclusions from the evidence. Nevertheless, both the District Court and the Court of Appeals refused to consider the Petitioner's case under the disparate impact model, the Court of Appeals citing its decision in *Pouncy* v. *Prudential Insurance Company*, 668 F.2d 795 (5th Cir. 1982), which prohibited the use of the disparate impact model of proof of employment discrimination under Title VII where the employee selection procedure is a subjective one. The Petitioner submits that this is not a proper interpretation of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. secs. 2000e et seq.

1. *GRIGGS* AND ITS PROGENY DO *NOT* RESTRICT DISPARATE IMPACT ANALYSIS TO OBJECTIVE SELECTION PROCEDURES.

Griggs v. *Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) and its progeny do not restrict disparate impact analysis to objective employee selection procedures.

Chief Justice Burger, writing for a unanimous Court in *Griggs*, announced what was the seminal interpretation of the monumental and far reaching statutory extension of equal protection into the private work place, Title VII of the 1964 Civil Rights Act, 42 U.S.C. secs. 2003 et. seq., It is appropriate that *Griggs* dealt with the effects of discriminatory practices. As the Court pointed out:

> The object of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests, neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 429-30.

When Chief Justice Burger wrote for the Court in *Griggs*, Title VII was but seven years old and the national debate and sometimes violent confrontations that preceded the enactment of the statute were no doubt still fresh in the minds of each Justice. No mention of intent was made in any version of the bill nor in the version that passed, Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443 (1986), and while the Chamber of Commerce in an amicus brief filed before this Court in *Griggs* argued for an intent standard to be applied,[16] the Solicitor General of the United States, in a position curiously different from that taken by the present Solicitor General,[17] argued in his Brief then submitted on behalf of the United States:

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[16] Brief of the Chamber of Commerce of the United States as Amicus Curiae at 7-9, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), *cited in* Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443, 446-447 (1986).

[17] *See* Brief of the United States as Amicus Curiae on Petition for a Writ of Certiorari at 9, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139):

> When Congress enacted Title VII in 1964, it made clear that employers could no longer intentionally select among applicants and employees on the basis of race, sex, or certain other enumerated criteria (42 U.S.C. 2000e-2(a)(1)). Less clear, however, was whether employers could, in good faith, and without the intent to discriminate, continue to use standardized tests and other mechanical devices for selecting among competing applicants and employees when the effect of using such devices is adverse to persons in one or more of the enumerated groups.

> For the congressional purpose in enacting Title VII was—as its heading "Equal Employment Opportunities" suggests—to accomplish economic results, not merely to influence motives or feelings. Discretionary "employment practices"—not attitudes—are declared unlawful.

Brief for the United States as Amicus Curiae at 15-16, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The former Solicitor General was certainly more in tune with the legislative history of the Act and this Court's firm adherence to the principles of *Griggs*. In *Hishon* v. *King & Spalding*, 467 U.S. 69, 75 n.7, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), Chief Justice Burger, again writing for the majority, interpreted Section 703(a)(1) of the Act by tracing its legislative history to S. Rep. No. 867, 88th Cong., 2d Sess. (1964). The Report states:

> Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures operate together with widespread built-in administrative processes through which non-white applicants are automatically excluded from job opportunities.

Id. at 5.

Subsequent case law has reaffirmed the Court's adherence to *Griggs*[18] and commentators have hailed the *Griggs* decision as a "successful social revolution."

> Under the impact of *Griggs*, employers discovered that many standards they thought necessary to find qualified employees were not in fact required. Once liberated from their attachment to non-job related criteria, they were able to increase dramatically their employment of minor-

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[18] Albemarle Paper Company v. *Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, (1977); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979); and *Connecticut* v. *Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982).

> ities and women. This performance is one of the great successful social revolutions of this, or any, era.

Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 Indus. Rel. L.J. 443, 450-51 (1986); *see also* Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 5 Indus. Rel. L.J. 313 (1984).

The exception to the effect analysis set up under *Griggs* is a more narrowly tailored disparate treatment analysis formulated by the Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and refined in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Justice Powell, writing for the Court in *McDonnell Douglas* found "the critical issue" before the Court "the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. Noting that the two opinions of the Court of Appeals had attempted "with notable lack of harmony" to state the applicable rules of proof, Justice Powell proceeded to address the problem. 411 U.S. at 801. The problem that the courts had had with cases such as *McDonnell Douglas* was that such cases simply did not fit the *Griggs* model because there was simply no evidence of systematic exclusion of persons in the protected class, but nevertheless, individuals were subjected to individual acts of discrimination for which they should be able to seek redress under the statute. The Court set out the formula for making such a proof (later refined in *Burdine)* and distinguished the case from *Griggs* as follows:

> And Petitioner does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected Respondent for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary and unnecessary

> barriers to employment" which the Court found to be the intention of Congress to remove.

411 U.S. at 806.

Thus the model of discrimination that focuses not upon a practice, but necessarily upon an individual act, which came later to be known as disparate treatment, is the exception rather than the rule in the fight to end racial injustice. A proper order of proof, when presented with facts evidencing differing treatment for minorities or women, is to measure the impact of the practice and if sufficiently disparate under the *Griggs* test, then to proceed with the order of proof under that test. If there is no impact because there is no practice, because the employer's decision is an isolated, individual one, or because there is no evidence to suggest an impact sufficient to invoke *Griggs*, then and only then, should the Court proceed to analyze the case for individualized discrimination not part of a practice generally affecting those protected by the statute.

Certainly nothing in the language of the *Griggs* opinion evidences any intention of limiting the Court's consideration of disparate impact cases to those in which the selection practice is objective as opposed to subjective. In describing the congressional purpose underlying *Griggs*, the Court referred to "tests or criteria":

> Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox.

401 U.S. at 431.

In concluding its opinion, the Court noted:

> Nothing in the Act precludes the use of testing or measuring *procedures;* obviously they are useful. What Congress has forbidden is giving these *devices* and *mechanisms* controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins.

401 U.S. at 436 (emphasis added).

The Court relied on the Equal Employment Opportunity Commission, responsible for enforcement of the Act, for assistance in interpreting Section 703(h) of the Act:

> The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

401 U.S. at 433-34 (citations omitted).

The initial Guidelines on Employment Testing Procedures issued by the EEOC on August 24, 1966 make no distinction between objective and subjective selection procedures. The Commission advocated:

> . . . use of a *total personnel assessment system* that is nondiscriminatory within the spirit of the law . . .

U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures, at 3 (1966). The Commission advocated that screening and interviewing be job related and emphasized that such interviewing and testing of minority applicants should be conducted by personnel "familiar with EEO policy." The Guidelines go on to state "[t]he Commission views tests as only one component of the personnel system—no better or worse than the selection system of which they are a part." *Id.*

Prior to the Court's decision in *Griggs*, the EEOC formally adopted and published in the Federal Register its Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (1970) (then codified at 29 C.F.R. sec. 1607.1 et seq.). The Commission defined tests in section 1607.2 as follows:

> For the purpose of the Guidelines in this part, the term "test" is defined as any paper-and-pencil or *performance measure* [emphasis added] used as a basis for any employment decision. . . . The term "test" includes all formal, scored, qualified or standardized techniques of assessing job suitability including, in addition to the above, specific

qualifying or disqualifying personal history or background requirements, specific education or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

. . .

Sec. 1607.5 Minimum standards for validation

. . .

[(b)](4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. . . .

. . .

Sec. 1607.13 Other selection techniques

Selection techniques other than tests, as defined in sec. 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as any tests which may be used, the evidence of validity being the same types referred to in secs. 1607.4 and 1607.5.

U.S. Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12334, 12335, 12336 (1970).

Thus, the very guidelines to which this Court gave "great deference" clearly defined and included in the term "test" various subjective procedures such as scored interviews and rating scales, and further, required validation even of casual interviews, selection techniques other than tests which were clearly subjective. Both the 1966 Guidelines on Employment Testing Procedures and the 1970 Guidelines on Employee Selection Procedures clearly contemplated evaluation of the total selection process, clearly including both objective tests and other subjective practices.

Subsequent decisions of this Court have upheld both the logic of evaluating the total selection process and the lack of distinction between objective and subjective standards. The Solicitor General, in his amicus curiae brief on the question of certiorari, seems to argue that a discretionary or subjective decisionmaking process is, by its very nature, always deliberate and based upon intent and thus, should be measured only by disparate treatment analysis. Thus the Solicitor General, erroneously concludes that only one method of proof is applicable to any set of facts, citing *Hazelwood School District* v. United States, 433 U.S. 299 (1977), *Teamsters* v. *United States*, 431 U.S. 324 (1977) and *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973)—all of which involved some subjective decisionmaking processes to which, the Solicitor General argues:

> The Court has declined to extend the disparate impact doctrine beyond the non-discretionary devices and unique exclusionary problems that initially led to its adoption.

Brief of the United States as Amicus Curiae at 11, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139).

The Solicitor General's reasoning is specious. In *McDonnell Douglas Corporation* v. *Green*, there simply was no evidence of group-wide impact, as was pointed out earlier. *See McDonnell Douglas*, 411 U.S. at 806.

The *Hazelwood* facts are closer to those of *Watson*. In *Hazelwood*, teachers were referred to individual school principals who had practically unchecked discretion in hiring. But while the Court examined individual disparate treatment claims and found them lacking, the Court's discussion of the statistical showing necessary to make out a disparate impact case indicates Court approval rather than disapproval of the use of disparate impact analysis upon subjective criteria. In *Hazelwood*, the question was whether or not the Government's statistical evidence was sufficient to prove disparate impact in a pattern or practice case. 433 U.S. at 312. The Court remanded the case to the District Court to conduct further findings as to the relevant labor market area and thus to determine "whether

Hazelwood engaged in a pattern or practice of discrimination. . . ." 433 U.S. at 313.

In *Teamsters*, the Government never attempted to prove a disparate impact case, even though the selection procedure involved was apparently not a subjective one, but rather an objective collective bargaining agreement seniority system which "operated to impede the free transfer of minority groups into and within the company." 431 U.S. at 331. Footnote 15 of this Court's opinion, however, in explaining the difference between disparate treatment and disparate impact, noted that "either theory may, of course, be applied to a particular set of facts." 431 U.S. at 335 n.15.

Likewise, any reliance on *Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978) for support for the Solicitor General's position is misplaced. In *Furnco*, the District Court and the Court of Appeals had concluded that *Furnco's* policy of not hiring at the gate was racially neutral on its face, but there was no showing that the policy had had a disparate impact or effect. 438 U.S. at 572. The Court of Appeals, while affirming the District Court's decision upon disparate impact, reversed as to disparate treatment and it was the treatment issue that reached and was decided by this Court. This Court's footnote 7, which has sometimes been relied upon for the proposition that disparate impact analysis may not be appropriate for subjective selection procedures, simply reiterated the disparate impact cases decided by the Court as of that date, and the Court elsewhere explained that since there was no evidence of disparate impact in the instant case, the *McDonnell Douglas* approach was sufficient. 438 U.S. at 572, 575.

The *Griggs* Court's emphasis on the EEOC guidelines certainly evidenced an intent to look at the whole selection process, and in *Connecticut* v. *Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), both the majority and the dissent agreed that the disparate impact approach includes examination of the entire range of employee selection devices. Justice Brennan, writing for the majority, held that:

> Relying on Section 703(a)(2), *Griggs* explicitly focused on employment "practices, procedures or tests" that deny equal employment "opportunity."

457 U.S. at 448 (citations omitted). While disagreeing with the majority's resolution of the case, Justice Powell wrote for the dissent, which included Justice Rehnquist, the author of *Furnco:*

> In keeping with this distinction, our disparate impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group. If this case were decided by reference to the total process—as our cases suggest that it should be—the result would be clear.

457 U.S. at 458 (emphasis in original).

Both opinions in *Teal* footnoted the Uniform Guidelines on Employee Selection Procedures, promulgated by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor's Office of Federal Contract Compliance Programs, and the Department of Justice. These Uniform Guidelines make explicitly clear that the total selection process which is subject to impact analysis includes subjective as well as objective selection procedures. *See* U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. sec. 1607.16(Q) (1987).

This Court's post-*Griggs* opinions simply cannot be explained by the "subjective is always intentional" rationale advanced by the Solicitor General. The Court's occasional resort to analysis of disparate treatment is better explained by Justice Powell's dissent in *Connecticut* v. *Teal:*

> There can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group.*

457 U.S. at 459 (emphasis in original).

The Ninth Circuit *en banc*, in *Atonio* v. *Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987), persuasively disposed of the Solicitor General's subjective intent argument:

> Defendants argue that there is a logical basis for a distinction between objective and subjective practices and for the correlative categorization of the analysis of the proof of impermissible discrimination. In their view, subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus. They argue that only objective practices can be evaluated for disparate impact.
>
> We disagree. Subjective practices may well be a covert means to effectuate intentional discrimination, as the Defendants point out, but they can also be engendered by a totally benign purpose, or carried on as a matter of routine adherence to past practices whose original purposes are undiscoverable. Subjective practices are as likely to be neutral in intent as objective ones. If, in fact, the subjective practices are a "covert means" to discriminate intentionally, by definition intent will be difficult to prove. If the practices are the cause of adverse impact, the purposes of Title VII are well served by advancing proof of adverse impact, thereby obviating the necessity of proving intent. Proof of intent where adverse impact can be shown may be not only unnecessary but undesirable because of the animus the process generates.

810 F.2d at 1484.

Clara Watson's case provides an excellent example of the Ninth Circuit's logic. When Watson applied for promotion in 1980, Pat Cullar was selected over Watson by her white supervisor, and given as one reason (although there could have been fifty or a hundred different factors, *see* Burt testimony concerning selection process, (J.A. 132, 134-35, 141) was that Pat Cullar had had more overall banking experience, though she had had five years less experience at Fort Worth Bank & Trust than had Clara Watson. One year later when Kevin Brown, another white was selected over Clara Watson for the motor bank supervisory position, one of the fifty or hundred considerations that went into the subjective decision by her supervisor to choose Brown over Watson was that Brown had had some prior supervisory experience before coming to the Bank—but the supervisor admitted that Brown had had only one year on the job, compared to Watson's then seven years. While the

District Court was "troubled" particularly by the latter decision and the inconsistency in the use of criteria in the decision-making process, the Court was loath to label it "intentional discrimination"—obviously, because the criteria involved and the process were facially neutral and might, if properly evaluated, prove a perfectly valid basis for an employment decision. When Gary Shipp, vice-president and personnel officer for the Bank, was confronted with evidence of the statistically significant disparity between white and black salary evaluations, he was simply unable to explain how that could have happened. (J.A. 175-76). When he was confronted with the fact that 3.5 percent of blacks were hired, and 14.8 percent of whites, once again, an overwhelming statistical racial disparity, Mr. Shipp could only respond that there must be some problem with the statistics. (J.A. 176-77). Was Mr. Shipp pursuing a covert means to effectuate an intentional discrimination? Or was he simply adhering to past personnel practices whose purposes were racially benign, but whose sloppy methods and unsubstantiated criteria permitted racial bias to be carried out unwittingly through the Bank's selection procedures? The Report of the United States Senate previously discussed, S. Rep. No. 867, portended the Ninth Circuit's reasoning in *Atonio:* "Overt or covert discriminatory selection devices, intentional or unintentional, generally prevail through the major part of the white economic community." The distinction between subjective and objective selection criteria is an artificial and pointless distinction never intended by Congress or this Court.

II. THE LEGISLATIVE HISTORY, AND CONGRESSIONAL INACTION UPON DISPARATE IMPACT WITH THE ADOPTION OF THE 1972 AMENDMENTS TO TITLE VII, EVIDENCE CONGRESSIONAL APPROVAL OF THE DISPARATE IMPACT APPROACH.

Justice Brennan, writing for the majority in *Connecticut* v. *Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), unequivocally relied upon the congressional intent to adopt disparate impact analysis when the Congress extended the

protections of Title VII to state and municipal employees in 1972:

> The 1972 amendments to Title VII do reflect Congress' intent to provide state and municipal employees with the protection that Title VII, as interpreted by *Griggs*, had provided to employees in the private sector: equality of opportunity in the elimination of racial barriers to professional development.

457 U.S. at 449.

The *Griggs* protection extended to subjective as well as objective employee selection devices:

> Congress voiced its concern about the widespread use by state and governmental agencies of "invalid selection techniques" that had a discriminatory impact. S. Rep. No. 92-415. . . .

Teal, 457 U.S. at 449.[19]

Senator Harrison Williams, a principal sponsor of the Senate bill that was ultimately enacted, expressly relied upon a United States Commission on Civil Rights report which was placed in the Congressional Record. That report demonstrates the Congress' awareness, in 1972, of the need to apply disparate impact analysis to subjective criteria.

> Two of the three barriers cited were "recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal treatment of minorities," and promotions made on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." U.S. Commission on Civil Rights, For All the People . . . By All the People—A Report on Equal Employment Opportunities in State and Local Government Employment, 1190 (1969), reprinted in 118 Cong. Rec. 1817 (1972).

Teal, 457 U.S. at 450.[20]

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[19] *Teal* relies upon the committee reports in both houses.

[20] For an exhaustive study of the legislative history of the 1972 amendments, *see* Thomson, *The Disparate Impact Theory: Congressional Intent in 1972—A Response to Gold*, 8 Indus. Rel. L.J. 105 (1986).

The House report which accompanied the House version of the bill (H.R. 1746) truly evidences the intent of Congress not only to adopt the doctrine of adverse impact but to test subjective as well as objective selection devices against it. In discussing the legislative history of the bill, the report describes the congressional view of the employment environment:

> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and of "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing validation requirements.[2] The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. . . . A recent striking example was provided by the United States Supreme Court in its decision in *Griggs* v. *Duke Power Company*. . . .
>
> [2]*See, e.g.*, . . . Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 32 Harv. L. Rev. 1623 (1969). . . . *Asbestos Workers, Local 53* v. *Vogler*, 407 F.2d. 1047 (C.A. 5 1969). . . .
>
> . . . .
>
> The provisions of the bill are fully in accord with the decisions of the courts and with the testing guidelines established by the Commission. . . .

H.R. Rep. No. 238, 92nd Cong., 2nd Sess., *reprinted in* 1972 U.S. Code Cong. and Admin. News, 2137, 2144, 2157.

The Cooper and Sobel article, comprehensively cited with approval in the House Report, discussed seniority and testing issues, including the application of disparate impact analysis to subjective criteria: "If any subjective procedure has a systematic effect in disadvantaging blacks, the employer should be required to show the same justification as for a test or other objective procedure." 82 Harv. L. Rev. at 1677. *Vogler*, an early

Fifth Circuit opinion cited approvingly in the House Report, struck down subjective union membership rules for their disparate impact violative of Title VII.

The report of the conference committee on the 1972 amendments to Title VII, clearly expressed Congress' desire that the then current case law of the Title would continue to govern:

> In any area where the new law does not address itself or any area where a specific contrary intention is not indicated, it was assumed that present case law as developed by the courts would continue to govern the applicability and construction of Title VII.

Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972, H.R. Conf. Rep., 92nd Cong., 2nd Sess., *reprinted in* 118 Cong. Rec. 7166 (1972).

Plainly, the Congress was aware of and deliberately approved the literature, case law, and EEOC Guidelines and decisions that had interpreted Title VII to test all employee selection practices, whether objective or subjective, for their disparate impact.

III. BOTH THE GUIDELINES AND DECISIONS OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION HAVE CONSISTENTLY HELD THAT SUBJECTIVE EMPLOYEE SELECTION PROCEDURES SHOULD BE TESTED FOR DISPARATE IMPACT.

The EEOC's interpretations of Title VII are entitled to great deference. *Griggs* v. *Duke Power Company*, 401 U.S. 424, 433-434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *McDonald* v. *Santa Fe Trial Transp. Company*, 427 U.S. 273, 278, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). This Court has afforded particular weight to administrative regulations that have been consistently interpreted and administered without change or legislative interference. In discussing the incorporation of the disparate impact test of discrimination in Title VI of the 1964 Civil Rights Act, for instance, this Court recognized the cooperation of seven agencies in drafting the regulations at issue

and noted that "the Title, furthermore, had been consistently administered in this manner for almost two decades without interference by Congress." *Guardians Assn.* v. *Civil Serv. Comm'n N.Y.C.*, 463 U.S. 582 at 592-93, 100 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (White, J.). Hence, an enforcing agency's interpretation of a statute may be confirmed or ratified by congressional inaction. *Haig* v. *Agee*, 453 U.S. 280, 291-300, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981).

The first part of this brief has shown the Commission's consistent advocacy, since its first published Guidelines, of the use of a "total personnel assessment system."[21]

Following the early 1966 Guidelines with a more comprehensive treatment, in 1970 the Commission, in published Guidelines on Employee Selection Procedures, defined "test" to include paper and pencil examinations as well as "performance measure[s] used as a basis for any employment decision."[22] "Tests" included personal history or background requirements, education or work history requirements, scored interviews, biographical information, scored application forms, and interview rating scales.[23] The regulations recognized and warned against the bias inherent in subjective evaluations of performance which an employer might use in an attempt to validate a test,[24] and required the employer to validate these evaluations and all other subjective selection techniques:

> Selection techniques other than tests, as defined in section 1607.2 may be improperly used so as to have the *effect* [emphasis added] of discriminating against minority

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[21] U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures, at 3 (1966).

[22] U.S. Equal Employment Opportunity Commission, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, 12334 (1970) (then codified at 29 C.F.R. sec. 1607.2).

[23] *Id.*

[24] *Id.* at sec. 1607.5.

> groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as any tests which may be used, the evidence of validity being of the same types referred to in sections 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs.[25]

The Commission re-issued these regulations, intact, in 1976.[26]

In 1978, the Equal Employment Opportunity Commission joined the Civil Service Commission, the Office of Federal Contract Compliance Programs in the Department of Labor, Department of the Office of Revenue Sharing in the Treasury, and the Department of Justice to adopt and publish Uniform Guidelines on Employee Selection Procedures. The Uniform Guidelines became part of the official regulations of the EEOC, at 29 C.F.R. 1607.1, et. seq. These Uniform Guidelines purposed to assist employers, labor organizations and others to understand and properly apply federal law prohibiting employment practices which discriminate by race, color, religion, sex, or national origin.[27] The comprehensive regulations once again tested such selection procedures for disparate impact, and insisted that selection procedures having a disparate impact be validated for job-relatedness. Consistent with the EEOC's

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[25] *Id.* at sec. 1607.13.

[26] U.S. Equal Employment Opportunity Commission, Guidelines of Employee Selection Procedures, 41 Fed. Reg. 51984 (1976) (then codified at 29 C.F.R. sec. 1607.1 et seq.).

[27] U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978) (codified at 29 C.F.R. sec. 1607.1 et seq.).

position since it issued its first 1966 Guidelines, the term "selection procedure" was defined as follows:

> Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.[28]

Promulgated shortly after the Uniform Employee Selection Guidelines was a series of "Questions and Answers" which were designed jointly by the enforcing agencies to "clarify and interpret, but not to modify" the Uniform Guidelines.[29] This interpretation of the Guidelines leaves no doubt that subjective employment selection procedures are to be tested by disparate impact analysis. Question five asks if the Guidelines apply "only to written tests." The answer responds in the negative, stating they apply to "all selection procedures used to make employment decisions" including "interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance."[30] Question fourteen asks whether the "total selection process," with all its components, constitutes the initial basis upon which disparate impact should be measured. The agencies answer that the total selection process "refers to the combined effort of all selection procedures leading to the final employment decision such as hiring or promoting," including any applicant interview or "supervisor's interview."[31]

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[28] *Id.* at sec. 1607.16(Q).

[29] U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures: Interpretation and Clarification, 44 Fed. Reg. 11996 (1979).

[30] *Id.* at 11997.

[31] *Id.* at 11999.

The enforcing agencies have therefore consistently required examination of the adverse impact of the total selection process, a position consistent with this Court's disparate impact cases. *Connecticut* v. *Teal*, 457 U.S. at 458. This consistency and insistence upon examination of the impact of both objective and subjective components of employee selection procedures predated this Court's decision in *Griggs* and the 1972 congressional amendment of Title VII.

The EEOC, moreover, in its administrative decisions, has expressly interpreted these regulations to require disparate impact analysis of subjective decision making in hiring, promotions, and other employment practices. In EEOC Decision no. 72-1885, the Commission found a practice of leaving all promotion decisions, for which there were no fixed standards, to the judgment of foremen. That practice, which resulted in a statistical disparity of minorities in the work place established a prima facie case of unlawful, disparate impact. 1983 Empl. Prac. Dec. (CCH) par. 6385 (May 31, 1972). In EEOC Decision no. 73-0520, the Commission found that hiring, promotions and other employment decisions hinged not upon any objective guidelines, but upon subjective recommendations of a purely caucasian supervisory staff. That practice was shown to have a statistically disparate impact on blacks in the managerial, supervisorial, clerical and higher-paying production classifications in violation of Title VII. 1983 Empl. Prac. Dec. (CCH) par. 6389 (June 14, 1973). Indeed, EEOC Decision no. 77-14 found an employer's subjective recruitment practices facially neutral, and part of a hiring and promotion process which, together with a resulting statistical racial disparity, conclusively proved past and present discrimination. 1983 Empl. Prac. Dec. (CCH) par. 6567 (March 15, 1977).

The enforcing agencies' application to subjective employee selection procedures of disparate impact analysis, before and after *Griggs*, an application consistently administered for over two decades without congressional interference, like a similar agency's consistent application of disparate impact analysis to Title VI, compels the conclusion that Congress intended Title

VII to extend disparate impact analysis to subjective employee selection procedures. *Guardians Assn.* v. *Civil Serv. Comm'n N.Y.C.*

IV. THE EXPERIENCE OF THE DISTRICT COURTS AND THE COURTS OF APPEAL SUPPORTS THE NECESSITY OF APPLYING DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT SELECTION DEVICES.

The Court of Appeals for the Ninth Circuit sitting *en banc*, in a well-reasoned decision confirmed that Circuit's adoption of the disparate impact model in analyzing subjective employment selection procedures.[32] *Atonio* v. *Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987). The Ninth Circuit, in *Atonio*, examined all of the relevant policy considerations on the path to adopting this policy and in doing so, summed up the considerations generally advanced by the other circuits that have applied disparate impact analysis to subjective employment selection procedures. The Court found that there is no bright line distinction between objective and subjective hiring criteria and that the difference is particularly meaningless when the criteria impact on a protected class. 810 F.2d at 1485. Finding little logic to the claim (advanced here by the Solicitor General, together with the Respondent) that "subjective practices are by nature and definition based upon intent and thus should be evaluated only for discriminatory animus," the Court found little difference between a subjective practice as a covert means to effectuate an intentional discrimination and a subjective practice neutral in intent but carried on as a matter of routine adherence to past practices which effectuates the same discrimination. 810 F.2d at 1484. The Court considered that the congressional intent to provide employers with an

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[32] Logically, the Court, following *Teamsters* v. *United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), found that both disparate treatment and disparate impact analysis can be used in order to resolve "the ultimate question, whether there has been impermissible discrimination by an employer." *Atonio*, 810 F.2d at 1480.

incentive to abide by Title VII guarantees, would be thwarted if the incentive to validate objective criteria was destroyed by allowing employers to switch to a purely discretionary hiring method. 810 F.2d at 1484. Finally the Court found that proving business necessity is no more onerous in a case involving subjective practices than in one involving objective practices because in either case, the employer is the person with the knowledge of what his practices are and how his employment practices affect employees. 810 F.2d at 1486. Although differing somewhat from case to case, the rationale and logic of the Ninth Circuit's *Atonio* opinion have been adopted by nine of the twelve Courts of Appeal.[33]

[33] First Circuit, *Robison* v. *Polaroid Corporation*, 732 F.2d 1010 (1st Cir. 1984) (layoff selection guidelines, including subjective evaluations of employees' knowledge, past performance and future potential, evaluated for disparate impact); Second Circuit, *Grant* v. *Bethlehem Steel Corporation*, 635 F.2d 1007 (2nd Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (disproportionate number of minorities advanced to foreman based on purely subjective determination of experience and standardless procedures); Third Circuit, *Wilmore* v. *City of Wilmington*, 699 F.2d 667 (3rd Cir. 1983) (fire department promotion system, incorporating subjective evaluations, found to have disparate impact); Sixth Circuit, *Rowe* v. *Cleveland Pneumatic Company, Numerical Control, Inc.*, 690 F.2d 88 (6th Cir. 1982) (unrestricted plant foreman discretion in rehire system); Seventh Circuit, *United States* v. *City of Chicago*, 549 F.2d 415 (7th Cir. 1977) (subjective requirement, including good character and moral conduct, held to adversely impact on minorities); Ninth Circuit, *Atonio* v. *Wards Cove Packing Company, Inc.*, *supra*; Tenth Circuit, *Lasso* v. *Woodman of World Life Ins. Co., Inc.*, 741 F.2d 1241 (10th Cir. 1984) (failure to promote to management position based on subjective criteria such as management experience, personality and leadership skills found to be subject to disparate impact treatment); Eleventh Circuit, *Griffin* v. *Carlin*, 755 F.2d 1516 (11th Cir. 1985) (disparate impact theory proper test of end result of multicomponent promotion process and of subjective elements of process); and District of Columbia Circuit, *Segar* v. *Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (disparate impact analysis proper to analyze subjective selection procedure evaluating DEA agents' tact, discretion, initiative, resourcefulness and ability to gain the cooporation and confidence of others).

Well-reasoned commentaries have supported the view of nine of the twelve circuits that subjective criteria are fully capable of being reviewed under the disparate impact model as a fair and workable measure by which to ensure equal employment opportunity.[34] The conclusion compelled by the case law and commentaries is that disparate impact analysis applied to subjective employment criteria is a practical and effective tool to carry out the goal of Title VII to eliminate discrimination in employment.

V. TO PROHIBIT SUBJECTIVE EMPLOYMENT SELECTION PROCEDURES FROM BEING REVIEWED FOR THEIR DISPARATE IMPACT TOWARD MINORITY EMPLOYEES AND APPLICANTS WILL ENCOURAGE EMPLOYERS TO ABANDON OBJECTIVE STANDARDS WITH THEIR INCUMBENT NECESSITY TO BE VALIDATED IN FAVOR OF WHOLLY DISCRETIONARY SUBJECTIVE STANDARDS WITH THEIR INHERENT POTENTIAL FOR DISCRIMINATION.

This Court has long recognized that highly subjective selection systems are highly susceptible to abuse and particularly so where racial considerations play a part. *Castaneda* v. *Partida*, 430 U.S. 482, 496-97, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).[35] It is no surprise that the EEOC in its Guidelines has long opposed subjective employment selection criteria because such criteria

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[34] Comment, *Applying Disparate Impact Theory to Subjective Employee Selection Procedures*, 20 Loy. L.A.L. Rev. 373 (1987); Comment, *Application of the Adverse Impact Analysis to Subjective Criteria in Title VII Employment Discrimination Cases*, 38 Baylor L. Rev. 363 (1986); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947 (1982); and Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969).

[35] This Court found the Texas system of selecting grand jurors through the key-man system to be facially neutral but "susceptible to abuse as applied." 430 U.S. at 497.

so easily lend themselves to discriminatory treatment.[36] The experience of the Circuit Courts has consistently condemned subjective practices:

> We have repeatedly held that subjective practices such as interviews and supervisor recommendations are capable of operating as barriers to minority advancement.

Griffin v. *Carlin*, 755 F.2d 1516, 1525 ((11th Cir. 1985).

In a pre-*Pouncy*[37] case, the Fifth Circuit Court of Appeals, in analyzing a strong statistical case showing that a General Motors Assembly Plant failed to promote blacks to supervisory positions, held:

> All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.

Rowe v. *General Motors Corporation*, 457 F.2d 348, 359 (5th Cir. 1972).

Even the Solicitor General agrees that subjective employment selection procedures are much more likely to result in a violation of Title VII:

> For a number of reasons, employers often prefer to use objective rather than subjective selection procedures. Standardized selection devices . . . by depriving personnel officers of discretionary authority, . . . help ensure that Title VII's proscription against intentional discrimination is obeyed by those with the greatest opportunity to engage in such discrimination.

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[36] *See* the discussion in section III above, and Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598 (1969).

[37] *Pouncy* v. *Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982).

Brief for the United States as Amicus Curiae, at 9-10, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139).[38] To prohibit disparate impact analysis of the procedures that are most susceptible of discrimination is going to encourage employers to adopt these procedures:

> Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions. It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than to validate objective criteria.

Griffin v. *Carlin*, 755 F.2d at 1525.

That this actually occurs has been the subject of observation by several commentators. "The litigious climate has resulted in a decline in the use of tests and an increase in more subjective methods of hiring." Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35, 35 (1985).[39]

The Fifth Circuit experience following *Pouncy*[40] is illustrative of the problem. Prior to the Fifth Circuit's 1982 decision in *Pouncy*, the Court had found that employment discrimination on the basis of race through various employment practices, including a minimum education requirement, had occurred at Travenol Laboratories, Inc. *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978). Travenol was prohibited by the District Court from "establishing facially neutral job prerequisites" except in accordance with EEOC

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[38] Curiously the Solicitor General seems to overlook Title VII's proscription against discriminatory effects. *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

[39] *See also* Tenopyr, *The Realities of Employment Testing*, 36 Amer. Psychologist 1136 (1981)(contending objective job testing is decreasing).

[40] *Pouncy* v. *Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982).

Guidelines. Rather than validating its procedures, Travenol instituted a subjective interviewing system which was then reviewed in the second decision of *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 806 (5th Cir. 1982). Meanwhile, however, the Fifth Circuit had decided *Pouncy* and when again Travenol appealed, the Court refused to apply the adverse impact model to the new subjective interview system. This counter-productive result is easily foreseeable.

The Solicitor General, arguing against the disparate impact test, foresees two results from adoption of Watson's position:

> . . . [A]llowing Plaintiffs to challenge subjective decisionmaking processes on a disparate impact theory, will force employers to either replace those selection procedures with objective ones or to eliminate any statistical disparities by using quotas.

Brief for the United States as Amicus Curiae, at 15, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139).

Requiring more objective criteria for employment selection procedures is a positive result that would foster job-relatedness in employee selection and advance Title VII's mandate to eliminate "barriers that have operated in the past to favor an identifiable group . . . over other employees." *Griggs* v. *Duke Power Company*, 401 U.S. 424, 429-30 (1971).

Instead of "fostering quotas," allowing plaintiffs to test subjective processes by impact analysis will provide an incentive for self-examination by employers of their compliance with equal employment goals:

> The "preferred means for achieving" this goal is through "cooperation and voluntary compliance."

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). As Justice O'Connor so aptly wrote in *Ford Motor Company* v. *EEOC*, 458 U.S. 219, 230, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982):

> Title VII's primary goal, of course, *is* [emphasis by the Court] to end discrimination; the victims of job discrimination want jobs, not lawsuits.

The alternative to subjective procedures is not quotas, but rather an intelligent examination of employment criteria so as to comply with Title VII goals. Nor is the validation of subjective criteria a difficult or costly task. In a well-reasoned and thorough review of the subject, Professors Doverspike, Barrett, and Alexander persuasively argue that validation studies can be both simple and inexpensive, and furthermore, cost effective. Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35 (1985). The Fort Worth Bank & Trust is a typical case in point. Rather than follow EEOC Guidelines for keeping records and testing for impact, the Bank simply ignored the regulations and never measured its practices impact.[41] In the face of the EEOC Guidelines and widely accepted, basic personnel practices, the Bank gave absolutely no instructions or criteria to the persons it left responsible for making hiring and promotion decisions.[42] If the Bank now prevails and disparate impact analysis cannot be used to examine its employment practices, is there any reason to believe that serious deficiencies already noted in the hiring and promotion of minorities will improve? Is there any reason to believe that the record keeping of the Bank will improve or that it will seriously consider examining its hiring and promotion practices?[43] If, as some commentators claim,

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[41] *See* U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures, 16 C.F.R. sec. 1607.15 (1987).

[42] Patricia Cullar testified that, as a supervisor, she was never given any guidelines or instructions on her hiring and promotion decisions. (J.A. 161-162). Her supervisor, Richard Burt, testified that no one reason could ever be given any particular weight in his decision to promote Cullar over Clara Watson because fifty or a hundred considerations typically enter into such decisions. (J.A. 134-135).

[43] Gary W. Shipp, Respondent's senior vice-president in charge of personnel, testifying at trial, answered in the negative:

> (Question by Mr. Brender): . . . I take it you wouldn't have any reason to change the bank's practices; is that right?
>
> (Answer by Mr. Shipp): I certainly would not.

(J.A. 177).

Griggs caused a reduction in objective job testing, then shielding the effects of subjective procedures from scrutiny will surely give employers an irresistible push to finally abandon objective employment standards.

VI. THE SUBJECTIVE CRITERIA IN AN EMPLOYMENT SELECTION PROCESS MAY MAKE IT IMPOSSIBLE TO PROVE INTENT UNDER *MCDONNELL DOUGLAS* v. *GREEN*.

As the Ninth Circuit pointed out in *Atonio* v. *Wards Cove Packing Company, Inc.*, 810 F.2d 1477 (9th Cir. 1987), subjective practices may be engendered by a "totally benign purpose" or simply carried out by "routine adherence to past practices whose original purposes are undiscoverable." 810 F.2d at 1484. If so, subjective practices are as "facially neutral" as an objective practice would be. In an early Title VII decision, the Fifth Circuit found subjective criteria to be facially neutral with regard to management's knowledge of the intent and/or stereotypes that cause adverse impact affecting minorities:

> . . . Blacks may very well have been hindered in obtaining recommendations from their foremen since there is no familial or social association between these two groups. All we do today is recognize that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management.

Rowe v. *General Motors Corporation*, 457 F.2d 348, 359 (5th Cir. 1972).

The Watson record reveals a similar lack of contact between whites and blacks at the Bank and even supervisor animus unbeknownst to management.[44] Gary Shipp's inability to

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[44] Clara Watson testified that blacks and whites sat at separate tables in the Bank's lunch room and that one white woman was disciplined by a supervisor who told her that she should "sit with her own kind." (Class Certification Hearing Transcript, pp. 42-43). The

explain evaluations indicating that blacks were performing a statistically significant ten points below whites and his inability to explain the huge difference in hiring rates between blacks and whites, when taken at face value, are typical examples of the type of routine adherence to "past practices" which make such subjective practices as neutral and lacking in intent as an objective practice would be.[45]

While objective practices may in fact be of a benign purpose, they can also be as the government argues, a covert means to discriminate intentionally. That being the case, however, as *Atonio*, points out, by definition "intent will be difficult to prove." 810 F.2d at 1484. That being the case, an often cited treatise on proof in discrimination cases argues that it is logical to apply the disparate impact doctrine to subjective practices which covertly discriminate.[46] Thus Gary Shipp's inability to explain the statistical disparities in the hiring, promotion and salaries of blacks may well suggest a covert intent to discriminate, but the evidence of such is locked within Shipp's mind. No

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supervisor made only a tepid denial that this had occurred. (Class Certification Hearing Transcript, pp. 286-87). There is also evidence that Gary Shipp did not socialize with blacks. (Class Certification Hearing Transcript, p. 43).

[45] The lack of any instructions or guidelines would not seem to stem from any purposeful discrimination, but yet have a high probability for allowing individual biases to affect employment decisions. Pat Cullar when questioned by the Court denied being given any instructions by anyone. . . . (by the Court) "Were you given any instructions by anyone connected with the Bank as to who to hire or not to hire?" . . . (answer by Ms. Cullar) "No sir." . . . (by the Court) "Or any matters whatsoever?" . . . (answer) "No sir, I make my own decisions." (J.A. 161). Cullar also stated that once she made a recommendation to management as to whom she wanted to hire, management hired them. (J.A. 162).

[46] See D. Baldus and J. Cole, *Statistical Proof in Discrimination*, sec. 1.23 (1980 and Supp. 1986), "The logic of the disparate impact doctrine appears to apply to covert legitimate policies, no matter how discretionarily they are applied, as well as it does to overt nondiscretionary criteria."

other evidence adduced at trial indicates that the system of wholly discretionary decisionmaking by supervisors in hiring and promotion was hatched as a plan or device by Shipp to prevent blacks from receiving equal employment opportunities.[47] In any event, the virtual impossibility of proving intent under such circumstances by disparate treatment analysis as set out in *McDonnell Douglas* v. *Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is obvious. The employer can always put forth a subjective reason for selecting the "best qualified" applicant, the one with the "best leadership" and "ability" and these facially neutral standards are impossible to rebut.

No better illustration of the impossibility of rebutting subjective criteria can be presented than the case at bar. Supervisors, such as Richard Burt and Pat Cullar, were provided with no standards whatsoever to guide them in determining whom they should hire or promote. (J.A. 135, 161). Richard Burt, when asked to explain the reason that he promoted Kevin Brown over Clara Watson to motor bank supervisor in 1981, stated that "in any decision like that, there's maybe fifty or one hundred things that really enter into it."[48] (J.A. 135). Mr. Burt

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[47] Other instances of Shipp's attitudes towards blacks may also be benign. For instance, a statement to Clara Watson that the teller position was a big responsibility with "a lot of money . . . for blacks to have to count," while arguably evidencing racial intent, can also be taken as evidencing a racial stereotype with no actual animus towards the individual involved. Shipp did promote Watson to teller, but his blunt statement about blacks counting money certainly indicates a racial stereotype of blacks as being poor, uneducated, never having been around money, and being unable to assume responsibility for counting large sums of it.

[48] In direct examination by the Bank's attorney, Burt cited experience, leadership ability, experience in supervising others, ability to get along with others, and *numerous* things (emphasis added) (J.A. 132). On cross-examination, he stated as follows: (by Mr. Brender) . . . But you mentioned experience, leadership, previous supervisory

refused to be pinned down even by the Court on any one particular reason as being the deciding one.[49] Leaving aside the difficulty of showing that subjective considerations such as leadership and an ability to get along with others are pretextual, it is impossible for a plaintiff to rebut fifty to one hundred criteria as pretextual, particularly when no one or two of the criteria are singled out as being the determining factor or factors in making the decision.

It seems only fair and logical to require the Bank with the knowledge of what its practices are and why it uses the methods and criteria it does, to shoulder the responsibility for explaining them. See *Atonio*, 810 F.2d at 1486; *Segar* v. *Smith*, 738 F.2d 1249, (D.C. Cir. 1984).

If the subjective employment practices of the Bank actually harbored a covert intent as the Government claims they must by definition, then the wisdom and perception of a federal District Court, a Court of Appeals and this Supreme Court have not been able to discern it. Yet the discriminatory effect on blacks remains. The impossibility of using disparate treatment analysis in such cases seems apparent.

VII. PERMITTING AN EMPLOYEE SELECTION SYSTEM WITH A DISCRIMINATORY EFFECT TO REMAIN IN EXISTENCE BY PROHIBITING THE ONLY PRACTICAL METHOD OF PROOF AVAILABLE TO ATTACK IT IS TO ENFORCE AN EXCLUSIONARY "QUOTA" SYSTEM ON MINORITIES AND WOMEN.

The Solicitor General in his amicus brief on behalf of the United States, argues that to permit the challenge to subjec-

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experience and ability to get along with others?—(answer by Mr. Burt) Those are the things that come to my mind. But in any decision like that, there's maybe fifty or one hundred things that really enter into it. (J.A. 135).

[49] When asked by the Court whether or not complaints about Clara Watson's performance had entered into his decision not to promote her, Burt stated "I think that is a factor. I would not say that that was the determining factor, but it is—you know, there is a lot of things that go into making a decision and that would be one of them." (J.A. 141).

tive employment selection procedures under disparate impact analysis will force employers either to replace those procedures with objective ones or to eliminate any racial disparities by using quotas. Brief of the United States as Amicus Curiae at 15, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139). The first of the Government's claimed effects would not only benefit equal employment opportunity, but also improve the efficiency and productivity of employers, a goal to be encouraged. The alternative proposed by the Government, that of requiring racial quotas, is not borne out by the evidence. Subjective procedures *are* capable of being cheaply and efficiently validated. Such validation may well provide a financial benefit to employers in terms of increased productivity.[50] Voluntary compliance with Title VII by adopting goals carefully tailored to remedy the effect of manifest imbalance in traditionally segregated job categories has been acknowledged as a necessary tool to enforce equal employment opportunities. *See Johnson* v. *Transportation Agency*, 480 U.S. , 108 S.Ct. , 94 L.Ed.2d 615 (1987). But that is not at issue here. Rather, it would appear that to adopt the position taken by the Respondent and the Solicitor General, that the Bank's subjective decision making processes are not subject to review for disparate impact, would be to encourage an ad hoc "quota" limiting equal employment opportunities in hiring, salary, and promotion at the Bank. The "quota" system is already in place. For every qualified black who comes to the Bank, three qualified whites

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[50] *See* the thorough discussion of the validation process in the Brief of the American Psychological Association as Amicus Curiae, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139). The APA Standards have been acknowledged by the EEOC as constituting the preferred method for the assessment of selection procedures since the first guidelines were issued in 1966. U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures (August 24, 1966). The current APA standards are incorporated into the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. sec. 1607.1 et seq. *See also* Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35 (1985).

must be hired.[51] Likewise, blacks receive ten fewer points than whites, on the average, on their evaluations and thus, less in merit raises each year.[52] Blacks advance at a rate six-tenths of a grade per year less quickly than whites even though similarly situated to the whites.[53] A racial "quota" has been imposed in this case limiting the opportunity of black applicants and employees at the Fort Worth Bank & Trust.

VIII. TO REQUIRE THAT SUBJECTIVE EMPLOYMENT SELECTION PROCEDURES BE VALIDATED WOULD NOT UNDULY BURDEN EMPLOYERS.

For over twenty years, the EEOC Guidelines have required that subjective employment selection procedures be validated. The very earliest court decisions[54] recognized the need to validate subjective decision making processes and ordered that those showing adverse racial impact be validated. Since 1966 with the publication of the first EEOC Guidelines and particularly since 1970, when the Guidelines took a form very similar to the current Uniform Guidelines, a consistent set of criteria and body of experience for evaluating the job relatedness of subjective employment practices have been available to employers. Extensive case law, both through Equal Employment Opportunity Commission decisions as well as in the federal courts, has developed to interpret and apply the administrative rules. The only real problem for employers seems to occur when they ignore the information available to them and fail, as the Bank did in this case, to perform the

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[51] The elimination of such a system whether intended or not is what Title VII was enacted to do.

[52] *See* the testimony of Tom Marshall, the Petitioner's statistical expert, as to the statistical analysis which shows the racially disparate impact on blacks of the Bank's decisionmaking procedures. (J.A. 77-105).

[53] *Id.*

[54] *E.g., Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

rudimentary record keeping necessary to do the self-analysis which the EEOC Guidelines require. The fact that nine of the twelve circuit courts have adopted the position advanced by the Petitioner, lends come credence to the belief that employers are not unduly burdened.

On the argument that subjective decision making procedures cannot be validated, the Petitioner would defer to the expertise of the American Psychological Association and the authority cited in its exhaustive and scholarly amicus curiae brief filed in this case. The 1966 EEOC Guidelines adopted the APA *Standards for Education and Psychological Tests and Manuals* as a basis for analysis of the job-relatedness of employment criteria.[55] This Court in *Albemarle Paper Company* v. *Moody*,[56] acknowledged that the 1970 Guidelines "draw upon and make reference to professional standards of test validation established by the American Psychological Association." 422 U.S. at 431. The Uniform Guidelines continue to draw upon the expertise of the APA and the Petitioner will do likewise. The APA's amicus brief outlines several areas in the Bank's basic personnel practices which are as inefficient as they are non-fulfilling of equal employment opportunity requisites. There are absolutely no written procedures for hiring or promotions. Nor was there any apparent attempt to define and implement prerequisites of the jobs so as to determine what qualities or talents are needed in persons chosen to fill those jobs. The job evaluation forms, which Dr. Marshall found to significantly and adversely impact on minorities, when analyzed by APA Standards, are clearly deficient in describing the behaviors of the employees in the jobs being evaulated. Furthermore, the factors that are important for promotability have never been properly weighed. The inefficiency of the Bank's practices, in addition to their adverse impact on minorities, is apparent. Seven months after Kevin Brown was pro-

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[55] U.S. Equal Employment Opportunity Commission, Guidelines on Employment Testing Procedures at 3-4 (1966).

[56] 422 U.S. 405, 431, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

moted to motor bank supervisor, Cullar found that he was only "close to being competent" and generally lacking in responsibility. (Pl. Ex. 3, R. I 63). Three months later, Brown resigned under pressure in light of decreased efficiency in the motor bank, and cited "poor communication and inadequate training." (Pl. Ex. 3, R. I 63). An objective analysis of the personality traits and characteristics necessary for the job, would undoubtedly have led to a more considered selection of a supervisor, to the advantage, rather than the disadvantage of the Bank. Literature and studies available for making such decisions are readily available and contrary to some contentions, not necessarily expensive, but rather cost efficient.[57] Content studies and validation generalization studies, which are approved by the Uniform Guidelines, are available to small employers whose record keeping indicates, by self-examination, that validation may be necessary.[58]

Unable to be seen above the trees of the argument concerning validating subjective practices, is a forest of impact. Before any validation must take place, the plaintiff must show impact.[59] Many of the commentaries that claim subjective practices should be free from disparate impact analysis base their arguments on small "mom and pop" concerns that are alleged to be unable to deal with the volume of psychological and psychometric information themselves or to incur the costs of a professional to do it for them. These arguments ignore the fact that impact must first be shown. As the *Atonio* Court points out, "The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact. . . ." 810 F.2d at 1486.

The great weight put on the plaintiff to produce impact evidence, combined with the vast body of validation informa-

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[57] Brief of the American Psychological Association as Amicus Curiae, at 22, *Watson* v. *Fort Worth Bank & Trust* (No. 86-6139); Doverspike, Barrett & Alexander, *supra*, and articles cited therein.

[58] *Id.*

[59] *See, e.g., Atonio.*

tion and experience available to employers, both large and small, alleviates any burden upon the employer whose employment practices adversely affect minorities so statistically significantly as to invoke the validation procedures set out in the Uniform Guidelines.

CONCLUSION

The Judgment of the Court of Appeals, upholding the Judgment of the District Court, insofar as it prohibited the Petitioner from having her case analyzed under the disparate impact theory, should be reversed.

Respectfully submitted,

ART BRENDER*
FRANK P. COLOSI
BRENDER, CASEY & COLOSI
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171

Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CLARA B. WATSON, *Petitioner*

v.

FORT WORTH BANK & TRUST, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondent

Bruce W. McGee*
Joseph W. Spence
GANDY MICHENER SWINDLE
WHITAKER & PRATT
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102
817/878-0565

Attorneys for Respondent

*Counsel of Record

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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STATEMENT

In August of 1973, Clara Watson applied for employment at Fort Worth Bank & Trust. (J.A. 5). Although she had no banking experience when she applied for employment, Watson was offered employment by the bank and accepted a position as a proof operator. (J.A. 5, 190). Approximately one year after starting with the bank, Watson was promoted to the position of teller trainee. (J.A. 6 and I Tr. 21). Upon completion of her training, Watson became a teller in the motor bank or drive-in bank. (J.A. 7). She remained in the position of motor bank teller until 1980 when she was promoted to the position of commercial teller and informal assistant to Richard Burt. (I Tr. 47).

Up to 1978, the bank conducted oral evaluations of its employees. The evaluations considered various factors which the bank considered important to its business. (J.A. 8). In 1979, the bank instituted a written evaluation system to evaluate employees. (II Tr. 80). The written evaluation forms were obtained from an outside consultant who performs similar services for other banks.

Beginning in 1979, the bank also adopted a posting procedure whereby job openings in the bank were posted to inform current bank employees of the positions available. (II Tr. 36). An employee who wished to apply for the position would fill out a form or application for promotion to the position. (J.A. 121). The supervisor over the open job position was in charge and had responsibility for interviewing each of the applicants, as well as evaluating the relative qualifications of the applicants. The supervisor would then make his or her best judgment as to which applicant would be given the job. (J.A. 131).

In February 1980, two supervisory positions became open at the bank. Watson was considered for both positions, however, Richard Burt was promoted to supervisor of lobby tell-

ers and Pat Cullar was promoted to supervisor of motor bank tellers. (I Tr. 40).

At the time of his promotion to supervisor of lobby tellers, Burt had experience in the general ledger department, as a credit analyst, as an assistant to Shipp, and as supervisor of the bookkeeping department. (III Tr. 28-29). He received his bachelor of arts degree in banking and finance shortly after his promotion to supervisor of lobby tellers. (III Tr. 28-29).

At the time of Cullar's selection as supervisor of motor bank tellers, she was working as the assistant to the lobby teller supervisor whose place Burt had taken and had obtained valuable supervisory experience. (III Tr. 87). In addition, Cullar had approximately eighteen years experience in banking. (III Tr. 202-204).

In addition to Watson, a white employee who had experience as supervisor of the motor bank tellers was also not selected. Watson acknowledged that she was not as qualified as Gail Leavitt, the white applicant. (I Tr. 147).

Immediately after these supervisor positions were filled, Watson was placed in the informal position as assistant to Burt. (I Tr. 157-158). Watson remained in the position of commercial teller and assistant to Burt until January of 1981. At that time, Watson was required to have foot surgery and took a leave of absence from the bank. (J.A. 18). While Watson was on leave, the positions of motor bank supervisor and lobby teller supervisor both became open again. (J.A. 18). Cullar, the motor bank teller supervisor, who had reported directly to Burt as lobby supervisor, was chosen by Burt to become the new lobby teller supervisor. (III Tr. 31). In choosing Cullar, Burt testified that there were many factors considered in arriving at his decision. Included in these factors were previous supervisory experience, leadership ability and the ability to get along with others. At the time Burt was considering the applicants, he formed an opinion that Cullar was the best qual-

ified candidate to assume the position of supervisor of lobby tellers. Further, Burt testified that he did not consider Watson to be as qualified as Cullar because there had been resentment from other tellers who had been under Watson's direction during the time she acted as his assistant. (III Tr. 33).

Burt testified that in making his decision to select Kevin Brown for the other position he again considered the fact that Watson had demonstrated an inability to get along with others. Burt was of the opinion that Watson did not have the respect nor the leadership ability that Brown possessed. (III Tr. 76). Burt considered the fact that Brown was a good teller, knew the people in the drive-in very well, and was of the opinion that they had respect for him. Burt also considered the fact that Brown had worked as the "lead person" in the afternoon shift in the motor bank. (III Tr. 76). As was the situation with the 1980 promotions, Burt considered a number of applicants before selecting Cullar and Brown. (J.A. 131).

Watson filed suit in the District Court alleging that the bank discriminated against her and other persons similarly situated on the basis of race in violation of 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* In support of her individual claim, Watson attempted to show that she had been the victim of intentional discrimination in the bank's decisions regarding the four promotions she sought. She also sought to show that the bank's use of a subjective, discretionary procedure for evaluating applicants for promotion resulted in a disparate impact upon her. Although she alleged a claim under both theories, Watson's proof was clearly patterned after the disparate treatment model as described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The thrust of Watson's case (as supported by her own testimony) was that she had been intentionally denied a promotion on four separate occasions by white supervisors on the basis of her race. (J.A. 45-47).

Although Watson offered certain statistical data concerning blacks and whites with regard to the hiring, promotion, and salary increase practices of the bank, Watson offered no evidence which identified a specific, facially neutral practice of the bank which created an adverse impact upon blacks.

The bank challenged the statistical evidence offered by Watson, pointing out that the hiring data was flawed because Waton's expert had failed to include at least 28 applicants in the data analyzed (II Tr. 183) and that her analyses failed to control for the relative qualifications of the applicants. (II Tr. 186). Likewise, the bank established that Watson's analyses were further flawed because her expert had based all of his analysis upon the dubious assumption that there were always job openings when black applicants sought employment at the bank. (II Tr. 185). Dr. Marshall also admitted that he did not consider the frequency which blacks and non-blacks actually sought promotions. (II Tr. 204). The District Court apparently determined that the statistical evidence offered by Watson was not probative because it found that her statistical evidence did not present a prima facie case of race discrimination. (J.A. 202).

However, with regard to Watson's individual claim, the trial court concluded that Watson had established a prima facie case of individual employment discrimination in that she was a member of a protected class, she applied for and was qualified for the position of lobby supervisor and motor bank supervisor in 1980 and 1981 and that she was not selected. The Court then concluded that the bank had met its burden of proof by articulating legitimate non-discriminatory reasons for each employment decision. The Court finally concluded that Watson failed to establish that the reasons articulated by the bank for choosing Burt, Cullar, and Brown were pretexts for racial discrimination. Accordingly, judgment was entered that Wat-

son take nothing and that her action be dismissed on the merits.

On appeal to the Fifth Circuit, the District Court's judgment rejecting Watson's individual claim was affirmed.

SUMMARY OF ARGUMENT

Petitioner complains that the Court of Appeals refused to examine her employment discrimination claims under the disparate impact model announced by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Griggs decision permits utilization of the disparate impact theory *only* when objective, facially neutral tests or requirements are at issue. Petitioner seeks to expand the *Griggs* holding to permit the challenge of not only subjective employment criteria, but also the "bottom line" effect of an employer's subjective employment process.

Eradication of intentional discrimination was the primary goal of Congress when Title VII was adopted. The disparate impact model of proof was crafted by this Court after Title VII was enacted to address employment practices which were neutral in int[illegible] but had a disparate impact upon protected groups. Subsequent opinions of this Court applying the disparate impact model have been careful to follow the distinction between "objective" and "subjective" employment criteria. While this Court has permitted objective employment practices to be tested under both the treatment and impact theories, the Court has refused to extend impact analysis to subjective criteria such as those which are present in this case.

Contrary to the assertions of petitioner, Congress did not mandate that disparate impact analysis should apply to all employment practices when it passed the 1972 amendments to Title VII. Accordingly, the legislative history of the 1972

amendments have little or no relevance to this Court's inquiry in this case.

Petitioner's reliance upon the allegedly consistent view of the government with regard to analysis of subjective employment criteria by application of the disparate impact model is without basis. Contrary to petitioner's assertions to this Court, the position of the EEOC on the issue has changed several times since Title VII was enacted. The current guidelines recognize that certain employment criteria cannot or need not be validated and provide that the employer must only "justify continued use of the procedure[s] in accord with Federal law."

The expansion of *Griggs* sought by petitioner is unwarranted and inappropriate. The disparate treatment model is the only appropriate method for analyzing subjective employment practices of the type utilized by respondent. Disparate impact analysis is only appropriate for analyzing employment criteria which are applied to all applicants mechanically and without exception.

Although as this Court observed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), both the disparate treatment and disparate impact theories may be applied to a particular set of facts, the theories are not interchangeably applied to all sets of facts. When the employment practices challenged are subjective, the basis of the complaint is that the subjective criteria have been *applied* in a discriminatory fashion. The disparate treatment model provides the only proper framework for analyzing such complaints.

If the position advocated by the petitioner is adopted employers will be faced with the impossible burden of validating all subjective criteria involved in normal personnel decisions. While perhaps it is theoretically possible to validate subjective criteria, practically speaking the economic cost to small employers makes the task impossible. As is demonstrated by the better reasoned opinions of the Court of

Appeals, the disparate treatment model provides an appropriate method for analyzing the application of subjective employment criteria. There is no basis or need to extend disparate impact analysis to subjective criteria.

ARGUMENT

Petitioner presented a case alleging that she was not selected for promotion to four supervisory positions because of her race and further that the bank's use of subjective selection procedures had a disparate impact upon her. The District Court considered fully the statistical and anecdotal evidence presented by both parties and determined that Watson had not met her burden of proof under the disparate treatment model. The Court of Appeals affirmed the trial court's judgment regarding Watson's individual claim. Watson now asks this Court to ignore its previous decisions and to permit her to employ the disparate impact model to attack the bank's use of a selection process which utilizes subjective evaluation of multiple factors for the purpose of selecting the best qualified applicant.

I. The Decisions of This Court Restrict Disparate Impact Analysis to Objective Selection Procedures

The basis for the disparate impact theory of proof is, of course, this Court's opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, this Court announced that Title VII applied not only to intentional discrimination, but also to an employment practice or selection criterion which is "fair in form, but discriminatory in operation." *Griggs* at 431. At issue in *Griggs* was the employer's requirement that employees have a high school degree and that they pass an aptitude test before they were qualified for promotion. In analyzing Title VII, this Court emphasized that the Act does not command that any person be hired simply because he was formerly the

subject of discrimination or because he is a member of a minority group, rather, what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. *Griggs*, 401 U.S. at 431. Petitioner has construed the holding in *Griggs* as a proclamation that disparate impact analysis is the rule rather than the exception in Title VII analysis. Petitioner emphasizes the Court's reference to "practices, procedures, or tests neutral on their face" as referring to any and all employment practices or procedures. However, in *Griggs*, the Court expressly defined the "practices" referred to as the objective, facially neutral requirements of high school degrees and the passing of a general intelligence test.

Petitioner has attempted to expand the holding in *Griggs* by arguing that the *Griggs*' opinion does not expressly limit disparate impact analysis to objective criteria in that there was no distinction made between subjective and objective employment practices in this Court's opinion. While it is true that the terms "subjective" or "objective" were not used to label the specific employer practices being challenged, it is clear that the holding in *Griggs* focused only on the narrow issue of the employer's requirement of a high school diploma and standardized testing requirements.

In enacting Title VII, there is little question that Congress was principally concerned with intentional discrimination.[1] However, this Court construed Title VII to encompass not only intentional discrimination, but also that which is "neutral in terms of intent". *Griggs* at 430. Although this Court did hold that employment practices which were neutral in intent were prohibited if they had a disparate effect upon minorities, noth-

[1] *See* Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 497-503 (1985).

ing in the opinion would suggest that this Court considered disparate impact analysis appropriate for testing *discretionary* employment practices.[2]

In fact, the Court's narrow analysis of Title VII and its ultimate holding is reflected in the final paragraph of the opinion wherein the Court states:

> Nothing in the Act precludes the use of *testing or measuring procedures*; obviously they are useful. What Congress has forbidden is giving these *devices and mechanisms* controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any *tests* used must measure the person for the job and not the person in the abstract. *Griggs*, 401 U.S. at 436. (Emphasis added).

The distinction between disparate treatment and disparate impact analysis was addressed by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The government alleged that the employer had engaged in a pattern or practice of discriminating against minorities in hiring "line drivers". In addition, the government challenged the seniority system established by the collective bargaining agreements between the employer and the union on the basis that the seniority system contained therein had an adverse impact on minorities. In analyzing the alleged dis-

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[2]Contrary to the implication from Petitioner's Brief at 17, the Solicitor General did not advocate application of the disparate impact model to discretionary employment practices. The Solicitor General is misquoted. The final sentence of the quoted portion of the Solicitor General's *Amicus* Brief in *Griggs* states that "*Discriminatory* 'employment practices' – not attitudes – are declared unlawful." Brief of the United States as *Amicus Curiae* at 16, *Griggs v. Duke Power Co.*, October Term, 1970. (Emphasis added).

parity in treatment involving the refusal to recruit, hire, transfer or promote minority group members on an equal basis with whites, this Court applied the disparate treatment analysis set forth in *McDonnell Douglas Corp. v. Green*; *see*, *Teamsters*, 431 U.S. at 335. In holding that the disparate treatment analysis applied to the recruiting, hiring, transferring and/or promoting of minority group members, this Court, by way of footnote, specifically distinguishes disparate treatment from disparate impact:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact". The latter involved employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Teamsters*, 431 U.S. at 335, *see* n.15.

While the Court noted that either theory may be applied to a particular set of facts, it is significant that *Teamsters* specifically distinguished claims which stress disparate impact from claims involving the employer's practices of recruitment, hiring, transferring, and/or promotion of minority group members. The Court made clear that such claims were to be analyzed as under the disparate treatment model.

In considering the government's contentions that the collective bargaining agreement and its seniority system had an adverse impact on minorities, the Court in *Teamsters* had an opportunity to further explore the application of the disparate impact analysis. After reviewing the application of the seniority system, the Court determined that the ultimate effect was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers. While the Court determined that the seniority system was protected by Section 7.03(h) as a "bona fide" seniority system, the Court noted that otherwise it

would have fallen within the *Griggs* rationale. The Court stated:

> One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs*: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. (Citations omitted).
>
> Were it not for Section 7.03(h) the seniority system in this case would seem to fall under the *Griggs* rationale. *Teamsters*, 431 U.S. at 349.

It was the seniority systems' effect of segregating minority employees in the less desirable jobs, and otherwise adversely impacting minorities, which caused the Court to conclude it would be subject to disparate impact analysis. As in *Griggs*, the seniority system created an artificial barrier to advancement by members of a protected class. As the Court in *Teamsters* observed, with regard to claims of discriminatory hiring practices, the "controlling legal principals are relatively clear." *Teamsters* at 334-35. The disparate treatment model was held to be appropriate for analyzing such practices, not impact analysis. Contrary to petitioner's view of *Teamsters*, the seniority system was not the only employment practice at issue. This Court was also faced with a direct challenge of a largely subjective employment system which resulted in a racial imbalance, just as were Watson's allegations here. This Court held that it was clear that such claims should be analyzed under the disparate treatment model. That same "relatively clear" legal principal was properly used to analyze Watson's claims.

Petitioner relies on *Hazelwood School District v. United States*, 433 U.S. 299 (1977). However, petitioner's suggestion that *Hazelwood* is authority for the application of disparate

impact analysis to subjective criteria is incorrect. *Hazelwood* is authority for application of a "pattern or practice" test to Watson's claim, which is of course an analysis for disparate treatment, not disparate impact. As petitioner correctly observes, the facts of *Hazelwood* are very similar to those at hand, and the claim asserted by Watson was properly tested under the disparate treatment model.

That *Hazelwood* is authority for application of disparate treatment analysis to employment practices which grant to supervisory personnel "virtually unlimited discretion"[3] to evaluate applicants for promotions based upon numerous intangible criteria, is further borne out by this Court's opinion in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Decided the same day as *Hazelwood*, *Dothard* applied disparate impact analysis to certain minimum height and weight requirements. In *Dothard*, the Court again took pains to distinguish the facially neutral employment standards at issue from the cases where proof of intent was required. The Court stated:

> The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment with the Alabama Board of Corrections. We dealt in *Griggs v. Duke Power Co.* and *Albemarle Paper Co. v. Moody* (citations omitted), with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment, and those cases guide our approach here. *Dothard*, 433 U.S. at 328-29.

It is significant that *Hazelwood* was not one of those cases which the Court mentioned as guiding its consideration of the height and weight requirements at issue in *Dothard*. Decided by this Court on the same day, *Dothard* and *Hazelwood* distin-

[3] *Hazelwood School District v. United States*, 433 U.S. 299 at 302 (1979).

guish this Court's application of disparate impact analysis to the objective employment standards present in *Dothard* from disparate treatment analysis of the essentially subjective employment practices utilized in *Hazelwood*. Although this Court did not engage in characterizing the practice as "objective" versus "subjective", it seems clear from the facts in *Dothard* that the employer practice in question is clearly objective.[4]

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), this Court once again distinguished between disparate treatment and disparate impact analysis. Petitioner has represented to the Court on page 23 of her Brief that the Court of Appeals concluded that Furnco's policy of not hiring at the gate was racially neutral on its face, but that there was no showing that the policy had a disparate impact or effect. However, petitioner's assertion is incorrect. Rather, in applying the narrow holding of *Griggs*, the Court of Appeals stated:

> As we understand the *Griggs*' principle, it provides a method for establishing the presence of discrimination where application of a test of a group of employees or applicants results in a proportionately higher rate of rejection of members of a minority group. Here the reliance upon the superintendent's recollection of brick layers he considered competent was not a test or device for comparing the members of a group of prospective employees, where there was no defined group. . . .
>
> This was not a case, like *Griggs*, of comparing white or black applicants by *objective*, but irrelevant standards, in rejecting more blacks, proportionately, than white. (Emphasis added). *Waters v. Furnco Construction Corp.*, 551 F.2d 1085 at 1089-90 (7th Cir. 1977).

[4] *Dothard* further relies on *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) in support of its disparate impact analysis. *Albemarle* involved a class action brought by black employees who challenged a job seniority system and the requirement of employment testing conducted by standardized written test. (Objective criteria). *See Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973).

This Court agreed with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas* (disparate treatment). *Furnco*, 438 U.S. at 575. In a supporting footnote, this Court noted that:

> This case did not involve employment tests, which we dealt with in *Griggs v. Duke Power Co.* And in *Albemarle Paper Co. v. Moody*, for particularized requirements such as the height and weight specifications considered in *Dothard v. Rawlinson*, and it was not a "pattern and practice" case like *Teamsters v. United States*. (All citations omitted). *Furnco*, 438 U.S. at 575 n. 7.

Petitioner tries to down play the significance of footnote 7 of *Furnco* by claiming that the footnote is simply a reiteration of the disparate impact cases decided by the Court as of that date. However, the footnote supports the single sentence holding of the Court that the proper approach in *Furnco* is the disparate treatment analysis of *McDonnell Douglas v. Green*. It seems highly improbable that the Court, after holding that the disparate treatment analysis applies, would support that holding with a footnote reiterating the various disparate impact cases which it had decided. It seems obvious that footnote 7 was added to distinguish between the factual situations which require disparate treatment analysis and those where disparate impact analysis is appropriate.

A few years later, in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court explained the basic allocation of burdens and order of presentation approved in a disparate treatment case under *McDonnell Douglas Corp. v. Green*. *Burdine*, 450 U.S. at 252. Nowhere in *Burdine* does the Court focus on disparate impact analysis, rather, the Court clearly indicates that the respondent's Title VII claim was properly analyzed under disparate treatment theory. *Burdine* alleged that the failure to promote her and

the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII.

The significance of this Court's application of the disparate treatment analysis to the facts in *Burdine* becomes more significant in light of this Court's application of the disparate impact analysis to the facts in *Connecticut v. Teal*, 457 U.S. 440 (1982). The plaintiffs alleged that the employer violated Title VII by imposing, as an absolute condition for consideration for promotion, that applicants pass a *written test* that excluded blacks in disproportionate numbers and that it was not job related. *Teal*, 457 U.S. at 444. The employer asserted a "bottom line" result defense in that the overall result of the selection process showed that a greater percentage of blacks were promoted.

This Court, in its majority opinion, concluded that the employees' claim should be analyzed under the disparate impact analysis of *Griggs*. In so holding, the majority consistently focuses on the fact that the case concerns a specific, facially neutral employment test that allegedly had a disparate impact on minorities.

Petitioner misconstrues *Teal* by asserting that the majority and the dissent agree that the disparate impact approach includes examination of the entire range of employee selection devices. The references of the dissent to the "total selection process" clearly relate to the majority's rejection of the "bottom line" defense asserted by the employer. The dissent is not suggesting that disparate impact analysis can be applied to a multiple component employment selection process. *Teal* demonstrates this Court's consistent limitation of the *Griggs* test to objective requirements and tests and that an employer will not be permitted to raise a "bottom line" defense to defeat a prima facie case of disparate impact. *Teal* is not to be read as an expansion of *Griggs*. As the majority holds, disparate impact analysis is not applied to the employer's entire selec-

tion process, but is only applied to distinct requirements and tests within the selection process.

Perhaps this Court's decision which is closest to the facts of the case at hand is *United States Postal Service Board of Governor v. Aikens*, 460 U.S. 711 (1983). *Aikens* involved an individual claim that the employer had discriminatorily refused to promote. In *Aikens*, the plaintiff showed that white employees consistently received promotions over him and other black employees, and that he was better qualified than the white who was selected for promotion in all but one instance. The plaintiff also introduced evidence showing that the person who was responsible for the promotion decisions had made numerous derogatory comments about blacks in general and the plaintiff in particular. *Aikens* at 713. These facts are quite similar to those which Watson claims to have established in support of her individual claim.

The Court left no doubt that the *McDonnell Douglas/Burdine* model should be applied to the Plaintiff's claim:

> We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. *See, e.g. Texas Department of Community Affairs v. Burdine*, 450 US 248, 252, n5, 67 L Ed 2d 207, 101 S Ct 1089 (1981); *McDonnell Douglas Corp. v. Green*, 411 US 792, 802, n 14, 36 L Ed 2d 668, 93 S Ct 1817 (1973). *Aikens* at 713.

Although the Court does not expressly so state, it seems obvious that disparate treatment analysis was appropriate because of the subjective criteria involved in the employment selections challenged. The exercise of discretion in choosing one applicant over another is not a facially neutral employment standard which may be tested by impact analysis. On the contrary, a claim that one was preferred over a minority employee as a result of a subjective interview process, where

the employer exercises discretionary judgment to chose the applicant best qualified, will always be a claim that the minority applicant was the victim of intentional racial discrimination.

An examination of this Court's decisions following *Griggs*, and those which distinguish *Griggs*, clearly demonstrate that subjective employment practices are not appropriate for disparate impact analysis. As Justice Brennan acknowledged in *Teal*, disparate impact analysis tests for discrimination which arises from facially neutral policies, while disparate treatment involves facially discriminatory policies. *Teal* at 455.

Watson complains of separate decisions made by different members of the bank's supervisory staff. She says that her nonselection was due to the bank's consideration of her race. There is little question that her position before the trial court was that she was the victim of intentional discrimination. After she could not satisfy her burden of proof to make a case of disparate treatment, she now attempts to characterize the bank's selection procedures as the same type involved in *Griggs* and its progeny. But as *Griggs* and those decisions of this Court following it have shown, the bank's evaluation process for determining which of several applicants is to receive a particular promotion is not the kind of facially neutral requirement or test which is appropriate for disparate impact analysis. Watson cannot point to any specific criteria which causes the disparate impact, but acknowledges that the bank relied upon numerous factors in its decisions. Watson's claim was properly tested under the *McDonnell Douglas/Burdine* model in that she was afforded a full and fair opportunity to convince the trier of fact that the bank's actions were motivated by intentional discrimination because of her race. The decisions of this Court offer no basis for now analyzing her claim under the disparate impact model. While the decisions of the Court do not refer by name to the distinction between claims which involve subjective selection criteria and those

which involve objective criteria, a review of the Court's decisions clearly demonstrates that the Court has consistently limited disparate impact analysis to those claims where objective, facially neutral selection criteria were present.

II. The Legislative History of the 1972 Amendments to Title VII Does Not Support Application of Disparate Impact Analysis to Subjective Selection Criteria

Petitioner and her *amici* contend that the legislative history of the 1972 amendments to Title VII shows that Congress mandated that the *Griggs* rule should apply to all employment practices, including subjective ones.[5] Specifically, they point to (1) the references in the legislative history to "systemic" or "institution" discrimination, (2) the concern with discriminatory practices by governmental employers, particularly those of the Civil Service Commission, and (3) Congress's asserted ratification of the result of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and of the pre-1972 case law on employment discrimination. These contentions are demonstrably incorrect.

Before examining the legislative history in detail, a basic preliminary point must be made. In 1972, Congress simply did not amend any of the provisions relevant to this case. *See* the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103. The specific provision at issue in this case, Section 703(a)(2), was amended only to add the words "or applicants for employment." This change does not suggest an intent to codify *Griggs*; still less does it suggest an intent to extend the coverage of *Griggs* to subjective practices. *See* Gold, *Reply to Thomson*, 8 Indus. Rel. L. J. 117, n.4 (1986). If Congress has re-enacted Title VII in 1972, such a decision might have signified an endorsement of existing judicial and administrative glosses on the statute. *Cf. NLRB v. Gullett Gin Co.*,

[5] *See* Brief for Petitioner 35-38; Brief for the NAACP Legal Defense and Educational Fund, Inc. *et al.*, 13-20; Brief for the Lawyers' Committee for Civil Rights Under Law 9-10.

340 U.S. 361, 365-366 (1951). But Congress did *not* reenact the statute. Thus, since the statutory language governing this case "was enacted in 1964, not 1972," and since "[t]he views of members of a later Congress, concerning different sections of Title VII, are entitled to little if any weight," it is the intent of the Congress that enacted Section 703(a) in 1964 that controls. *Teamsters v. United States*, 432 U.S. 324, 354 n. 39 (1977). Any debate about the intent of the 1972 Congress is therefore really academic.

Assuming, *arguendo*, that the 1972 legislative history has some relevance to this case, petitioner and her *amici* in any event misinterpret it. That history reveals no intent whatever to extend *Griggs* to subjective practices. If anything, it shows that Congress looked with favor on administrative enforcement of the aims of Title VII through disparate *treatment* litigation, *i.e.*, pattern-or-practice suits.

The genesis of the 1972 amendments, as relevant here, was as follows. A bill designated H.R. 1746 was introduced by Cong. Augustus Hawkins and reported out unchanged by the House Committee on Labor and Education. The Hawkins bill was turned down in a floor vote in favor of the "Erlenborn substitute," H.R. 9247, a measure introduced by Congressman John N. Erlenborn as an alternative to the Hawkins bill. See 117 Cong. Rec. 32111.[6]

During the House floor debate on September 14-15, 1971, several supporters of the Hawkins bill referred in their remarks to "systemic" or "institutional" discrimination. Congressman Perkins, who chaired the House committee, spoke to that issue in his introductory remarks on September 14; however, he clearly linked the existence of such discrimination to the need to give broader enforcement and litigation authority to the Equal Employment Opportunity Commission

[6]Petitioner seems to imply, mistakenly, that the Hawkins bill passed the House. *See* Brief for Petitioner 36.

(EEOC), which under the 1964 Act had only conciliatory and persuasive powers.[7] Congressman Perkins did not suggest that *Griggs* should be extended to cover these employment practices. *See* 117 Cong. Rec. 31960. Nor did other supporters of H.R. 1746 who raised the issue of institutional discrimination; they advocated the same solution as Congressman Perkins's, *i.e.*, they sought to empower the EEOC to issue cease and desist orders, and to initiate litigation. *See* 117 Cong. Rec. 32095 (remarks of Del. Fauntroy); *id.* at 32096 (remarks of Cong. Eckhardt); *id.* at 32102 (remarks of Cong. Badillo); *id.* at 32104 (remarks of Cong. Fraser); *id.* at 32106 (remarks of Cong. Stokes).[8]

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[7]Prior to the 1972 amendments, the only civil actions authorized by the statute were private lawsuits or "pattern-or-practice" actions brought by the Attorney General. The EEOC's role in eliminating employment discrimination was limited chiefly to conciliation and persuasion. As a result of the 1972 amendments, authority to bring "pattern or practice" cases was transferred to the EEOC, except in cases where the defendant was a governmental entity. See Section 706(f)(1), 42 U.S.C. 2000e-f(f)(1). As the Court has said, "Congress became convinced * * * that the 'failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII.' []S. Rep. No. 92-415 p. 4 (1971). The 1972 amendments to Section 706 accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII." *General Telephone v. EEOC*, 446 U.S. 318, 325 (1980) (footnote omitted). *See, also, e.g.*, 118 Cong. Rec. 3962 (remarks of Sen. Javits) ("the price of the Civil Rights Act of 1964 was a very weak job discrimination title"); *id.* at 4080 (remarks of Sen. Williams) (to like effect); *id.* at 4082 (remarks of Sen. Javits).

[8]One provision of the rejected Hawkins bill would have amended Section 703(h) of Title VII insofar as that section provides that "it shall not be an unlawful employment practice * * * for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate * * *." Congressman Perkins explained that the proposed amendment to Section 703(h) was designed to "alter[] the language of Title VII better to reflect the congressional intent as interpreted by the Court in the *Griggs* case." 117 Cong. Rec. 31961. The proposed amendment was defeated together with the rest of the Hawkins bill; there were no comments on it other than Congressman Perkins's. No parallel provision appeared in S. 2515, the Senate bill sponsored by Senator Williams. While

The substantive provision of the Senate bill introduced by Senator Williams, S. 2515, were similar in relevant respects to those of the Hawkins bill;[9] in particular, S. 2515 would have conferred cease and desist powers on the EEOC – a measure both houses ultimately rejected.[10] In the Senate debate, as in the House debate, those who spoke of institutional discrimination also urged expanded EEOC authority, not the extension of *Griggs*, as an antidote to the problem. Senator William's introductory remarks on his bill were similar in tenor to Congressman Perkins's introductory remarks on the Hawkins bill in the House. *See* 118 Cong. Rec. 294 (remarks of Sen. Williams). Other Senators who spoke of institutional discrimination likewise envisaged EEOC enforcement authority as the cure. *See id.* at 580 (remarks of Sen. Javits); *id.* at 590 (remarks of Sen. Humphrey); *id.* at 944-945 (remarks of Sen. Spong) (opposing Williams bill, but urging EEOC be given authority to litigate); *id.* at 3978 (remarks of Sen. Moss) (supporting Williams-Javits position).[11]

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it may be hazardous to draw any inferences from such Congressional inaction, *see Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. _____, 94 L.Ed.2d 615 (1987) (Scalia, J., dissenting), certainly the result does nothing to support the view that the 1972 Congress codified or ratified *Griggs*.

[9]*But see* n.8, *supra*.

[10]Petitioner states, not entirely accurately, that the Williams bill was "ultimately enacted." *See* Brief for Petitioner 35. In this crucial respect, however, the original Williams bill survived only as amended. Both supporters and critics of the Williams bill regarded the conferral of cease and desist powers on the EEOC as one of its key provisions. *See, e.g.*, 118 Cong. Rec. 3965-3979; Thomson, *The Disparate Impact Theory: Congressional Intent in 1972 – A Response to Gold*, 8 Indus. Rel. L. J. 105, 109 (1986) ("[t]he main struggle in both houses of Congress concerned whether the EEOC would have power to issue cease and desist orders"). Nevertheless, the Senate ultimately passed an amendment by Senator Dominick, S. 884, that denied such enforcement power to the EEOC, and required it to initiate litigation in a federal district court. *See* 118 Cong. Rec. 3979.

[11]*See* 118 Cong. Rec. 3965 (colloquy between Sens. Dominick and Javits) (describing differences between S. 884, the Dominick amendment, and S. 878, the Williams-Javits proposal to which Sen. Moss spoke).

The same perceived deficiency in Title VII, and the same proposed cure, were discussed at length in the Report of the Senate Committee on Labor and Public Welfare, S. Rep. 92-415, 92nd Cong., 1st Sess. 4-5 (1971). (The Report was attached to the original, unamended Williams bill). In a section entitled "Need For The Bill," the Report states (*id.* at 12) that:

> [i]n 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. * * * Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

See also H. Rep. No. 238, 92d Cong., 1st Sess. 21-22 (1972) (attached to the Hawkins bill). The statements immediately preceding this reference to "systems" and "effects," however, make clear that the Senate Committee's solution was to change the role of the EEOC from an agency devoted to voluntary conciliation efforts, to an agency that, like the National Labor Relations Board or the Securities and Exchange Commission,[12] could issue cease and desist orders (*id.* at 11):

> The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination. In prohibiting discrimination in employment based on race, religion,, color, sex or national origin, the 1964 Act limited the Commission's enforcement authority to

[12] *See, e.g.*, 117 Cong. Rec. 31960 (remarks of Cong. Perkins) (drawing comparison to cease and desist powers of other agencies).

> 'informal methods of conference, conciliation and persuasion.' * * * This failure to grant the EEOC meaningful enforcement powers has proven to be major flaw in the operation of Title VII. While the statutes dealing with discrimination in housing and in education provide appropriate enforcement powers for the agencies responsible for the elimination of discrimination in those areas of the law, Title VII, as it now stands, is little more than a declaration of national policy. Regretably [sic], the practices and policies of discrimination are so deeply ingrained that the voluntary conciliation approach has not succeeded in adequately combating the existence of such practices.

On February 22, 1972, the Senate passed the amended S. 2515. 118 Cong. Rec. 4944. The differences between the House and Senate bills were resolved in conference, and the final version, as reported from the conference, was ratified by both houses. 118 Cong. Rec. 7573 (House); *id.* at 7170 (Senate).

Petitioner's *amici* further argue that the expansion of Title VII's coverage in 1972 to include governmental employers also evidences an intent to extend *Griggs* to subjective decisionmaking.[13] But this Court pointed out in *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. ____ , 94 L.Ed.2d at 628 "[w]hile public employers were not added to the definition of 'employer' in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, 'Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike'" (citing *Dothard v. Rawlinson*, 433 U.S. 321, 323 n. 14 (1977)). Consequently, the broader post-1972 coverage of Title VII does not suggest that Congress altered the pre-1972 substantive standards for determining the lawfulness of subjective practices.

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[13] *See* Brief for the NAACP Legal Defense and Educational Fund, Inc., *et al.* 15-17.

The legislative record bears out this conclusion. The references in the floor debates to practices by governmental employers that had racially disparate effects were intertwined with the argument that extending Title VII's protections to governmental employees would bring the necessary relief. *See, e.g.*, 118 Cong. Rec. 296 (remarks of Sen. Williams); *id.* at 1815 (remarks of Sen. Williams) (introducing into the record a 1969 report of the U.S. Commission on Civil Rights on which petitioner relies (Brief for petitioner 35-36)). Senator Williams did *not* argue that impact theory had to be applied across the entire range of governmental – and hence private – employment procedures. He said instead that "[t]he inclusion of State and local government employees within the jurisdiction of Title VII will fulfill the congressional duty to enact the 'appropriate legislation' to ensure that all citizens are treated equally in this country" (118 Cong. Rec. 1816). In other words, Senator Williams apparently believed that the extension of Title VII's protections to government workers would *in itself* be an adequate remedy for the abuses pointed out in the Report of the Commission on Civil Rights.[14]

Nor do the statements in the 1972 legislative reports, to the effect that then-developed case law would continue to govern Title VII, prove that Congress intended *Griggs* to apply to subjective practices. *See* H.R. Conf. Rep., 92nd Cong., 2d Sess., reprinted in 118 Cong. Rec. 7166 (1972).

First, this Court has repudiated excessive reliance on pre-1972 lower Court decisions as a basis for interpreting Title

[14]Other speakers emphasized that the problems in the federal civil service would be corrected by empowering the EEOC, rather than the Civil Service Commission, to take antidiscriminatory measures. *See* 117 Cong. Rec. 32094 (remarks of Del. Fauntroy); *id.* at 31961 (remarks of Cong. Perkins). Congressman Perkins added that it was also expected that the Civil Service Commission would continue its own "affirmative measures" against federal employment discrimination. *Id.* These remarks (which in any case were addressed to the unsuccessful Hawkins bill) also fall far short of the claim that *Griggs* was to be extended to subjective practices in both governmental and private employment.

VII. Thus, in *Teamsters v. United States*, 431 U.S. 324, the Court considered and rejected the argument that the 1972 amendments had codified all prior Title VII cases that had struck down good faith seniority systems. And, in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 582 n. 15 (1984), the Court again rejected the "contention that Congress intended [in 1972] to codify all existing Title VII decisions * * *."

Furthermore, none of the pre-1972 cases, including *Griggs*, had settled the issue whether subjective practices with adverse impact on protected groups had to have a "manifest relation" to the job in order to avoid breaching Title VII. "[I]t may be said with confidence that there is nothing either in the facts of [*Griggs*] * * * or in the language of the opinion[] that could serve as authority for extending [its] requirements beyond objective tests and other objective measures such as educational requirements . . ." 3A A. Larson & L. Larson, *Employment Discrimination* para. 76.30 at 15-81 (1987).

Finally, there was pre-1972 case law (in the form of suits against public employers under the Fourteenth Amendment or 42 U.S.C. 1983) holding that some subjective decisionmaking was shielded from such testing.[15] In *Smith v. Bd. of Educ. of Morrilton Sch. Dist.*, 365 F.2d 770, 781-782 (8th Cir. 1966), then Judge Blackmun wrote that "teaching is an art and that excellence does not depend upon knowledge, experience, formal training and classroom conduct alone. Fitness for teaching rests upon a broad range of factors and encompasses numerous personality and character traits. * * * Nothing contained in this opinion is intended to be restrictive of a school board's freedom to make a full inquiry and to give due consid-

[15]Although these cases were not decided under Title VII, their relevance to the 1972 amendments is clear. *See Allen v. City of Mobile*, 466 F.2d 122, 125-126 (5th Cir. 1972) (Goldberg, J., dissenting) (noting that prior to 1972 amendments, Section 1983, as applied to governmental employees, had "strong analogy" to Title VII).

eration to an applicant's qualifications so long as the board does not act unreasonably, arbitrarily, capriciously or unlawfully." *Id.* at 632-633. See also *Lewis v. Chicago State College*, 299 F. Supp. 1357 (N.D. Ill. 1969) (to like effect in Section 1983 case). If Congress codified (or even approved) existing case law, it presumably also codified (or approved) *Smith*, *Lewis* and similar employment discrimination decisions, and so has arguably ratified a "reasonableness" test for at least some subjective decisionmaking.

Similar arguments undercut petitioner's reliance on the Court's statement in *Connecticut v. Teal*, 457 U.S. 440, 447 n. 8 (1982), that the legislative history of the 1972 amendments "demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*."[16] The *Teal* footnote does not suggest that Congress actually codified *Griggs* (as opposed to just endorsing it). Furthermore, Congress's approval of *Griggs* would not assist in the resolution of this case, which unlike *Griggs* concerns subjective, not objective, processes. And in any event, as *amici* concede,[17] the Court has placed little or no weight on the 1972 legislative history where the relevant statutory language - in this case, that of Section 703(a)(2) – was unaffected by the

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[16]*See* Brief for Petitioner 35; *see also* Brief for the NAACP Legal Defense and Educational Fund, Inc. *et al.* 14.

We note, however, that some commentators consider Congress's response to *Griggs* to have been more ambiguous. *See* Gold, *Reply to Thomson*, 8 Indus. Rel. L. J. 117-119; Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423, 436-437 (1980). Thus, *e.g.*, a Senate proposal to strike the word "intentionally" from the remedial provision of Title VII, Section 706(g), was deleted at the insistence of the House, so that the 1964 wording was retained. *See* 118 Cong. Rec. 6647 (Joint Explanatory Statement of Managers at the House-Senate Conference); Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 883-884 (1972). *See also* n.8, *supra*.

[17]*See* Brief of the NAACP Legal Defense and Educational Fund, Inc., *et al.*, 14 n. 12.

amendments. *Cf. Teamsters v. United States*, 431 U.S. at 354 n. 39.

In sum, petitioner and her *amici* err in reliance on the 1972 legislative record. Congress simply did not deal with the issue of subjective employment practices in any of its actual enactments. Indeed, the fact that the 1972 amendments confer authority on the EEOC to bring pattern-or-practice suits suggests that, contrary to petitioner's thesis, Congress envisaged that disparate *treatment* litigation of that form would be a large part of the answer to the problem of "institutional" discrimination.[18] If the 1972 legislative history is relevant at all, then, it tends to demonstrate exactly the opposite of petitioner's view.

III. Administrative Interpretation Has Not Been Consistent Regarding Application of Subjective Employee Selection Procedures to Disparate Impact Analyses

Petitioner urges (Pet. Br. 20-21, 24, 29-34) that the Court defer to what she claims has been the consistent view of the government – advocated since Title VII's enactment in 1964 – that the disparate impact analysis and its corollary manifest relation/business necessity requirement apply to subjective selection processes. But petitioner overstates the consistency with which the government has adhered to this view and, per-

[18]Senator Javits stressed the importance of the statutory change transferring to the EEOC the power to initiate pattern-or-practice suits against private employers. "By our decision yesterday we gave the EEOC the power to bring suit in big as well as small cases. * * * I have said on a number of occasions in this debate that [the Civil Rights Act of 1964] was a compromise and that much was given up, especially in respect of seeking a remedy against discrimination in employment. * * * That is why we felt we had to give the Attorney General the power to sue in big cases, in class action cases, and in cases where there was a constant pattern of discrimination directed at individuals with limited resources whom we were relegating to the courts and who could hardly be expected to carry such a broad and deep case. We are now changing that and giving it back to the Commission." 118 Cong. Rec. 4081-4082. *See also id.* at 4081 (remarks of Sen. Williams).

haps more importantly, mischaracterizes the views of the government, including the EEOC, today.

Contrary to petitioner's suggestion, the EEOC has not consistently interpreted Title VII as prohibiting use of subjective selection processes that have an adverse impact and that have not been proven manifestly necessary to the job or other business need. In fact, it appears that the EEOC initially took the position that "discrimination" based on educational qualifications (of the kind later at issue in *Griggs*) did *not* violate Title VII. *See* Opinion Letter, dated October 2, 1965, GC 296-65, cited at Pet. App. 147b, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Thereafter, the EEOC took notice of the fact that objective tests might to used to exclude qualified minority applicants. *See Guidelines on Employment Testing Procedures*, August 24, 1966. Accordingly, it issued guidelines advocating that employers refrain from using such tests wherever they would have the effect of perpetuating past discrimination and were not job-related. *See id.; see also* Decision of the EEOC, CCH Empl. Prac. Guide ¶17304.53 (Dec. 2, 1966). But the guidelines were directed exclusively to the meaning of the phrase "professionally developed ability test[s]" that appears in Section 703(h) of the statute (42 U.S.C. 2000e-7(h)).[19] They were *not* addressed to other kinds of selection devices or employment practices, objective or subjective.

To be sure, the 1966 Guidelines did advocate the use of nondiscriminatory "total personnel systems." But they did not, as petitioner suggests (Pet. Br. 20), state or imply that such personnel systems in their entirety – or, for that matter, any single component of them – had to be formally validated. Rather, the Guidelines advocated that test results not *alone* determine an employer's personnel choices, at least not where other factors suggested that minority group applicants would be

[19]The origin of the 1966 Guidelines is discussed (by an EEOC official who was instrumental in creating them) in Blumrosen, *Strangers In Paradise: Griggs v. Duke Power Co. And The Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 60-61 nn.5-7 (1972).

successful employees. Indeed, where the 1966 Guidelines did mention a practice that is ordinarily considered subjective (*i.e.*, interviews), they did not propose that that practice be formally validated. Instead, they stressed the desirability of finding interviewers whose racial attitudes were likely to be free from subjective biases.

It was only in 1970 that the EEOC extended its guidelines specifically to cover subjective selection processes and to require that those processes, like objective selection practices, be validated or otherwise formally substantiated. *See Guidelines on Employee Selection Procedures*, 35 Fed. Reg. 12333 (Aug. 1, 1970). Thus, in Section 1607.3 of the 1970 Guidelines, the EEOC defined "discrimination" to include "any test which adversely affects hiring, promotion, transfer or any employment or membership opportunity of classes protected by Title VII * * * unless * * * the test has been validated and evidences a high degree of utility * * *" (*id.* at 12334). The concept of a "test" was then explained in Section 1607.2 to encompass "any paper-and-pencil or performance measure used as a basis for any employment decision," including "scored interviews, biographical information blanks, interviewers' rating scales, [and] scored application forms" (*ibid.*), and Sections 1607.4 though 1607.8 described a single standard for demonstrating the validity of all of these selection devices (*see id.* at 12334-12336). Finally, Section 1607.13 noted that "[s]election techniques other than tests, as defined in §1607.2, may be improperly used so as to have the effect of discriminating against minority groups" and that these "techniques include, but are not restricted to, unscored or casual interviews and unscored application forms" (*id.* at 12336). In such circumstances, Section 1607.13 provided (*ibid.*) that the employer

> * * * may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of

> the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representation of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

The EEOC's Guidelines were in effect from 1970 to 1978. During that period, however, the Department of Labor, the Department of Justice, and the Civil Service Commission were operating under anti-discrimination and employment testing regulations that differed in many critical respects.[20] Moreover, courts and commentators became increasingly critical of the EEOC's Guidelines, charging that they imposed professionally unrealistic and effectively unattainable requirements on employers and that they vested government prosecutors with excessive and uncontrolled authority to restrict private and public employment practices.[21] Accord-

[20] *See Douglas v. Hampton*, 512 F.2d 976, 961-962 & n.37 (D.C. Cir. 1975) (noting apparent inconsistencies); *see also* Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 Geo. Wash. L. Rev. 505, 527 & nn. 138-139 (1973). The various problems that arose as a result of these inconsistent regulatory frameworks are discussed in *Comptroller General of the United States, Report to the Congress: Problems With Federal Equal Employment Opportunity Guidelines On Employee Selection Procedures Need to Be Resolved* 12-17 (1978); Comment, *Courts, Psychologists, And The EEOC's Uniform Guidelines: An Analysis Of Recent Trends Affecting Testing As A Means Of Employee Selection*, 36 Emory L. J. 203, 219 (1987).

[21] *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., dissenting); *United States v. Georgia Power Co.*, 3 FEP Cas. 767, 787 n.8 (N.D. Ga. 1971), *aff'd in part and vacated in part*, 474 F.2d 906 (5th Cir. 1973); Booth & MacKay *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 Emory L. J. 121, 125 (1980); *see also* Gold, *"Griggs'" Folly: An Essay on the Theory, Problems, and Origin of*

ingly, the EEOC joined with these other agencies in rethinking the principles that underlay the extant standards governing employee selection procedures.[22]

The upshot of these inter-agency deliberations was the promulgation of the Uniform Guidelines On Employee Selection Procedures, 29 C.F.R. 1607, to which all four agencies, including the EEOC, are signatories. These Guidelines provide that the "use of any selection procedure which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory * * * *unless* the procedure has been validated * * * *or* the provisions of Section 6 [of the Guidelines] * * * are satisfied" (29 C.F.R. 1607.3A (emphasis added). Moreover, they state that a "selection procedure" includes [a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q). Section 6 of the Uni-

the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7 Indus. Rel. L. J. 429, 459 (1985); Lerner, *"Washington v. Davis": Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 304, 306. Oddly enough, as these commentators note, the American Psychological Association (APA) was one of the foremost critics of the EEOC's Guidelines. *See, e.g.*, Brief Amicus Curiae of the APA in *Washington v. Davis*, No. 74-1492, at 18-24, 28.

[22] In adopting the Equal Employment Opportunity Act of 1972, Congress created the EEO Coordinating Council (EEOCC) in order to eliminate inter-agency conflicts and regulatory inconsistencies. *See* Sec. 715 of Title VII, as amended in 1972, 42 U.S.C. 2000e-14. In November 1972, the EEOCC decided to develop a set of uniform guidelines reconciling inter-agency differences. The Department of Justice, the Department of Labor, and the Civil Service Commission joined in 1976 in adopting the resulting Federal Executive Agency (FEA) guidelines, which those agencies found better reflected professionally accepted standards than did the 1970 EEOC Guidelines. *See* 41 Fed. Reg. 51734 (1976); Comment, *supra*, 36 Emory L. J. at 220; Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 Cath. U. L. Rev. 605, 608-610 (1979). The EEOC joined the other enforcement agencies in this effort in 1978.

form Guidelines, however, states that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines" (29 C.F.R. 1607.6B (emphasis added)), that such "circumstance" include the use of "informal or unscored selection procedure[s]" (29 C.R.R. 1607.6B(1)), and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (*ibid.*). Thus, unlike Section 1607.13 of the 1970 Guidelines, which imposed a formal substantiation requirement on employers using subjective selection processes associated with numerical disparaties in the workforce, the 1978 Guidelines only require the employer to "justify continued use of the procedure[s] in accord with Federal law."

The Uniform Guidelines do not clearly define how an employer "justif[ies]; continued use of the procedure in accord with Federal law." In subsequent questions and answers, the agencies stated that "[t]he method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B." 44 Fed. Reg. 12002 (1979). But, in the prefatory comments to the Guidelines themselves, the agencies did state that "[a] few practices may be used without validation even if they have an adverse impact. See *e.g.*, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and section 6B." 43 Fed. Reg. 38291 n. 17 (1978). In short, the Uniform Guidelines not only provide no support for petitioner's argument that employers must validate or otherwise formally substantiate their subjective selection processes, the agencies that promulgated them appear to believe that an employer satisfies the "in accord with Federal law" standard by articulating a legitimate, non-discriminatory reason for its procedures (as in *McDonnell Douglas v. Green*).[23]

[23]Petitioner errs in suggesting (Pet. Br. 33) that administrative decisions of the EEOC establish that the Uniform Guidelines require that disparate impact analysis be applied to subjective selection processes. The decisions

This interpretation of the Uniform Guidelines is confirmed, of course, by the brief amicus curiae of the United States and the EEOC in this case. In that brief, the government and the EEOC argue that, where a subjective selection process is in issue, an employer justifies "continued use of the procedure in accord with Federal law" by setting forth legitimate, nondiscriminatory reasons for maintaining the procedure and for applying it in particular cases, as is required in a disparate treatment case. The current position of the government and the EEOC represents a "sensible construction" of both the Guidelines and the statute, a construction which is "not negated by legislative history" (*Pattern Makers League v. NLRB*, 473 U.S. 95, 116-117 (1985) (White, J., concurring)). Thus, contrary to petitioner's suggestion, if the Court is to defer in this case to the Uniform Guidelines, it should find that disparate impact theory does not apply to subjective selection processes.

IV. The Disparate Impact Theory Should Not Be Applied to Claims Involving Subjective Employment Practices or Criteria Because the Disparate Impact Theory is Inappropriate for Analysis of Such Claims

In the presentation of her case to the District Court, petitioner alleged that she was the victim of intentional discrimination, as well as discrimination resulting from the impact of respondent's subjective employment practices. However, it is clear from the record that the proof offered by petitioner was intended to present her case under the disparate treatment theory. Quite probably petitioner recognized that even if the disparate impact theory were available to her, the facts of her

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that petitioner cites arose under the 1970 Guidelines. Administrative decisions of the EEOC under the 1978 Guidelines in fact indicate that "a subjective selection process cannot be facially neutral and, thus, cannot be analyzed under the disparate impact doctrine" (*Ziman v. USPS*, No. 01842595 (July 23, 1986), at 14).

case would prevent its employment.[24] Because petitioner was unable to satisfy her burden of proof on her disparate treatment case, and because she did not identify any aspect of respondent's employment process which was suitable for testing under the *Griggs* model, the District Court found that petitioner had failed to prove her case.[25] The District Court's judgment, as it relates to the issue before this Court, was affirmed by the Court of Appeals for the Fifth Circuit.

In the decisions following *Griggs*, this Court has applied disparate impact analysis *only* to criteria which, like the high school diploma and objective test score requirements in *Griggs*, are specific, defined, identifiable, and *objective*.[26]

Petitioner's assertion that her claim should have been tested under the impact theory is erroneous because she challenges hiring criteria which she acknowledges are purely subjective. When subjective hiring practices or criteria are challenged, it is clear that the disparate treatment model is the only appropriate method for analyzing Watson's claim.[27]

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[24]As has been pointed out by one of the *amici* briefs supporting petitioner's position, the evidence presented by petitioner demonstrated that she viewed her case as appropriate for disparate treatment analysis, and further that the number of promotions sought by blacks were not of sufficient number to establish any pattern. Brief for the NAACP Legal and Education Fund, inc.; *et al*, at 2 n.1.

[25]The District Court concluded that petitioner had failed to show that the reasons articulated by respondent for promoting others, rather than petitioner, were pretext for racial discrimination. (J.A. 197).

[26]*See Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (standardized test); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 589-91 (1979) (policy against employing persons who use narcotic drugs); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height and weight requirements); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412-13 (1975) (standardized tests). *Cf. International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (applying the disparate treatment model to a Title VII action challenging subjective hiring and promotion practices); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (applying the disparate treatment model to a Title VII action challenging standardless, largely subjective hiring procedures).

[27]Title VII does not preclude use of discretion or subjectivity in decisions by employers. If the subjective criteria are applied without consideration of

Objective criteria are neutral in design *and* application. By definition, objective criteria are applied mechanically and without exception to all applicants. It is for this reason that disparate impact analysis is appropriate where objective criteria are involved. The disparate impact model looks at a facially neutral requirement which has a disparate effect upon members of a protected class, despite fairness and uniformity in treatment and application. Once such a requirement is identified by plaintiff, the employer must demonstrate that there is a valid business necessity for utilization of the requirement *Griggs*, 401 U.S. at 432.

Conversely, subjective criteria are determined by factors which are personal and individualized to the one making the selection decision. They are determined, whether consciously or not, by that person's own perspective, beliefs, background, circumstances, judgments, and ultimately intent. Subjective criteria lack the uniformity associated with objective criteria. When selection decisions are made by many different people, as was the bank's practice, the lack of uniformity is magnified even greater. When objective criteria are utilized there is a hazard that a facially neutral policy or requirement may result in discrimination, regardless of lack of discriminatory intent. However, with use of subjective criteria unintentional discrimination is not the concern. To the contrary, the principal worry is that subjective criteria will be influenced by the biases, especially racial biases, of the one making the selecting decisions. Objective criteria are applied in a mechanical fashion, but subjective criteria are employed on an ad hoc basis.[28] The disparate treatment model was created so that discrimi-

race or other irrelevant factors, there is no violation of Title VII. *See Hill v. Seaboard Coast Line RR Co.*, 767 F.2d 771, 775 (11th Cir. 1985); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981).

[28] *See Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984); 3 A. Larson & L. Larson, *Employment Discrimination* ¶76.34 at 15-87 to 15-88.

nation rising from improper use of subjective criteria could be uncovered.

Although the disparate treatment and disparate impact theories are each designed to unearth discrimination based upon consideration of impermissible factors, the two are not applicable interchangeably. Each theory has its own unique function in bringing about the goals Congress envisioned when Title VII was enacted. As this Court observed in *Teamsters*, "[e]ither theory may, of course, be applied to a particular set of facts."[29] However, that is not to say that both theories are applicable to any and all sets of facts.[30] Even when applied to the same set of facts, the two theories serve completely different roles and functions in accomplishing Title VII's goals.[31]

If Title VII plaintiffs are permitted to apply the disparate impact model to all sets of facts, obviating the need to provide discriminatory intent, there would be no role left for the disparate treatment model in any case involving statistical proof of discrimination. By merely demonstrating an imbalance, a plaintiff could shift the heavy burden to the employer to prove that *any* employment practice, whether objective or subjective, is justified by business necessity.

Elimination of the role of the disparate treatment model would be contrary to both Congressional intent and this Court's previous interpretation of Title VII. The Court has

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[29] *International Board of Teamsters v. United States*, 431 U.S., 324, 336, n.15 (1977).

[30] Where it is alleged that an objective selection criterion results in a statistically significant racial disparity, a plaintiff could proceed under either or both theories. But one should not infer from the use of both theories to a particular set of facts that either theory can be applied to all sets of facts.

[31] This Court continues to stress that disparate treatment and disparate impact are conceptually and fundamentally different theories of discrimination. *See, e.g., Furnco* 438 U.S. at 581-82 (Marshall, J., concurring in part and dissenting in part) ("It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways.") *See also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713 n.1 (1983); *Burdine*, 450 U.S. at 252 n.5.

recognized that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters*, 431 U.S. at 335 n.15 (citing legislative history of Title VII). Moreover, the Court's approval of the use of statistics as evidence of intentional discrimination in *Teamsters*, 431 U.S. at 339, and *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977), undeniably demonstrates that a plaintiff cannot be relieved of the burden of showing discriminatory intent simply because the case involves statistical proof. It also demonstrates that the disparate impact model should not be permitted to inundate and replace the disparate treatment model in discrimination actions.

Moreover, if disparate impact analysis applies to subjective criteria, then the *Griggs* requirement that the employment practice at issue be proved to be job related will also apply to subjective criteria. Validating subjective criteria as job related, however, is impossible. It is impossible to devise objective measures of subjective qualifications. It would be futile to attempt to score criteria which involve subjective judgment. One cannot convert the subjective elements of a selection process to objective by merely ascribing numbers to them. For the same reason, it is impossible to define and devise reliable measures of job performance or employee adequacy in terms of subjective criteria, as is necessary in validation studies.[32]

More importantly, validating subjective criteria such as those used by the bank is unnecessary. The purpose of vali-

[32]Even courts which mistakenly apply disparate impact analysis to subjective systems implicitly assume that those systems inherently are incapable of being validated. They analyze the lawfulness of those systems through consideration of factors other than technical validation studies, such as the court's perception of the overall fairness to employees of the subjective procedures. *See, e.g., Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 90, 95 (6th Cir. 1982); *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 662 (5th Cir. 1976), *cert. denied*, 434 U.S. 822 (1977); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972). Indeed, often the factors considered have nothing to do with job-relatedness. *See, e.g., Id.*, 457 F.2d at 358-59.

dation is to determine the job-relatedness of the criterion itself without regard to the manner through which it is applied. Common sense dictates that attitude, reliability, honesty and loyalty are related to any job. The real issue with subjective criteria is whether they are fairly applied in a color-blind manner, not whether they are job related.

No employer could defend itself successfully against a charge that its subjective selection procedure was discriminatorily applied by relying upon the job-relatedness of the criteria. Thus the petitioner's assertion that the bank should be required to validate its promotion process is misplaced and unpersuasive.

Because the employer cannot defend itself against a disparate impact challenge to its subjective selection system on the grounds of business necessity, disparate impact actions challenging subjective systems are in reality merely statistical battles. The employer's only defense is to refute the plaintiffs' statistical evidence.[33] The burden which the employer must bear under disparate impact analysis to justify subjective systems which result in a significant racial disparity, therefore, is insurmountable.

The employer is then left with two choices. First, the employer can install a totally objective system. It would, for example, refrain entirely from interviewing applicants or having any other face-to-face contact with applicants (since that inevitably results in the consideration of subjective factors) even though it is well settled that subjective interviews are

[33] *See, e.g., Rowe v. Cleveland Pneumatic Co.*, 690 F.2d at 95 ("If the employer in the present case had been confronted with a *prima facie* case of disparate impact as a result of its [subjective] hiring practice, the unrestricted discretion and unexplained subjective decisions would have failed to rebut that *prima facie* case.") *Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 453 n.2 (10th Cir. 1981) ("[W]here the policy objected to is vague and general, once plaintiff shows discrimination by the use of statistics, the employer may only rebut the claim of discrimination by the use of statistics.").

not per se illegal and that employers are permitted to use subjective selection systems.[34]

The other more likely consequence of exposing subjective interviews to disparate impact analysis is employer reliance upon surreptitious, inflexible quota systems outside the permissible parameters of voluntary affirmative action plans.[35] The practical effect of applying disparate impact analysis to subjective criteria is simple, pure quota-based employment decisions because reliance upon a quota is the only means by which an employer can both use subjective criteria and protect itself from Title VII liability.[36] Race, then, rather than being irrelevant, becomes the most relevant factor in hiring decisions.

Quota systems, however, are blatantly contrary to the basic intent and purpose of Title VII.[37] From *Griggs* onward, the

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[34]*See, e.g., Heagney v. University of Washington*, 642 F.2d 1157 at 1163 (9th Cir. 1981); *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188 at 193 (3d Cir. 1980). *See also McDonnell Douglas Corp.*, 411 U.S. at 803 (rejecting a lower court holding that the defendant's proferred reasons for refusing to hire the plaintiff were entitled to little weight because they were subjective).

[35]Under Supreme Court precedent, while certain forms of race-conscious relief to remedy past discrimination are lawful, the type of informal, surreptitious, inflexible quota system that would inevitably result from applying disparate impact analysis to subjective criteria is unlawful. The test established in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), for voluntary affirmative action programs is whether the program (1) contains safeguards necessary to avoid trammelling the rights of non-minorities, (2) is designed to remedy past discrimination and (3) is temporary. An informal quota system that is covert, unstructured, open-ended and/or has only the general goal of avoiding liability under Title VII cannot meet the criteria set forth in *Weber*. *Lilly v. City of Beckley*, 797 F.2d 191, 195 (4th Cir. 1986) (holding that a white police officer who was not hired for a job on the Beckley, W. Va. police force because of the city's informal affirmative action program was a victim of racial discrimination under Title VII).

[36]Hiring by quota to protect oneself from liability under Title VII, however, is prohibited. The Supreme Court, in *Weber*, 443 U.S. 193, refused to adopt the "arguable violation" theory as its justification for upholding an affirmative action plan. The "arguable violation" theory contends that voluntary affirmative action can stem merely from an employer's wish to insulate itself from Title VII liability.

Supreme Court has consistently held that Title VII was not designed to force an equality of group representation in the workplace.[38] As the Court first articulated in *Griggs*, "the Act does not command that any person be hired simply . . . because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.*"[39] It would be ironic if Title VII and the *Griggs* decision, which were intended to require employers to hire applicants without regard to race according to their qualifications, should have the ultimate practical effect of discouraging color blind merit hiring.

The purported rationale of Watson's position before this Court also is prohibited by the Supreme Court's holding in *Connecticut v. Teal*, 457 U.S. 440. In *Teal*, the Court rejected the "bottom line" defense.[40] The Court explained that it "has

[37] In response to an objection posed by opponents of the bill that Title VII would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area, Senator Clark remarked that "[q]uotas themselves are discriminatory." 110 Cong. Rec. 7218 (1964). Both proponents and opponents of the Act agreed that Title VII did not mandate a rigid quota system in which employment opportunities would be allocated without regard to merit and solely in proportion to the representation of protected groups in the general population or in any particular pool. Thus, Section 703(j) of Title VII, 42 U.S.C. §2000e-2(j), provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[38] *See, e.g., Burdine*, 450 U.S. at 259, *Furnco*, 438 U.S. at 579; *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 at 709 (1978); *McDonnell Douglas*, 411 U.S. at 800-04; *Griggs*, 401 U.S. at 430-31.

[39] 401 U.S. at 430-31 (emphasis added). *See also Teamsters*, 431 U.S. at 340, n.20 (Title VII does not require an employer's work force to be racially balanced).

[40] The plaintiffs in *Teal* challenged Connecticut's selection process for welfare supervisors. The state's promotion scheme required, first, passing a writ-

never read §703(a)(2) as requiring the focus to be placed . . . on the overall number of minority or female applicants actually hired or promoted," *id.* at 450, and ruled that Title VII requires that the focus be upon discrimination against individuals, not groups. *Id.* at 451, 453-54. Just as the "bottom line" cannot provide a defense to a charge of discrimination, it cannot provide the basis for finding liability.

Watson and her *amici* argue that the disparate impact model must be made available to analyze subjective selection criteria or such employment practices will be insulated from challenge under Title VII. The only basis for her assertion is the unsubstantiated assumption that the disparate treatment model is not suited to prove unlawful discrimination.[41] Watson would have this Court turn all Title VII cases which contain evidence of a statistical imbalance into a disparate impact case.

As an illustration of the problem she perceives, Watson cites the Fifth Circuit's decision in *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982).[42] Watson implies that because of the Fifth Circuit's decision in *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795 (5th Cir. 1982) the plaintiff was denied an opportunity to challenge

ten test and, second, consideration of work experience, recommendations and seniority. Evidence showed that disproportionately more blacks than whites failed the test but that disproportionately more blacks than whites were promoted. The plaintiffs argued that the scheme violated Title VII under the disparate impact theory because the state had not validated the written test as job-related. The state argued that the result of the entire process, reflecting no adverse impact on minority group members, precluded the finding of a Title VII violation.

[41]Merely because petitioner's case was largely based upon statistical proof does not mean that the disparate treatment model was unavailable to her. In light of *Teamsters*, 431 U.S. 324 (1977), and *Hazelwood*, 433 U.S. 299 (1977), courts have held that statistical proof is relevant and important in an individual claim of disparate treatment. *See, e.g., Davis v. Califano*, 613 F.2d 957, 962 (D.C. Cir. 1980); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 (9th Cir. 1980).

[42]Petitioner's Brief at 38-9.

Travenol's subjective interview system because he could not use the disparate impact model. However, such was not the result in *Payne*. The Fifth Circuit analyzed proof which the plaintiff had tailored to meet the *Griggs* disparate impact elements under the disparate treatment model required by *Pouncy*. Relying upon this Court's decisions in *Teamsters* and *Hazelwood*, the Fifth Circuit affirmed the trial court's conclusion that because of its use of a subjective interview process, Travenol had engaged in intentional discrimination.[43]

Thus, it seems clear that Title VII plaintiffs do not need an additional method for challenging subjective employment practices. The disparate treatment model of *McDonnell Douglas/Burdine* and its application in *Teamsters* and *Hazelwood* provide the proper theory for rooting out any discriminatory intent or treatment contained in an employer's subjective empioyment practices. Petitioner's claims were properly considered by the trial court under the disparate treatment model. There is no necessity or basis for creating a different model to review them again. Petitioner was unable to convince the trier of fact that she had been the victim of discriminatory treatment and the Court of Appeals has affirmed. Those factual findings are not challenged before this Court, therefore this Court should affirm the Court of Appeals judgment.[44]

V. The Better Reasoned Decisions of the Courts of Appeals Recognized that Disparate Impact Model is not Appropriate for Analyzing Subjective Employment Judgments

Petitioner has incorrectly represented to the Court that nine of the twelve Courts of Appeals have adopted the dispar-

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[43] *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, at 815-20.

[44] *See, Goodman v. Lukens Steel Co.*, 482 U.S. _____, 96 L.Ed.2d 572, 584, 107 S.Ct. _____ (1987) (In a Title VII case, where the Court of Appeals did not set aside the trial court's findings of fact, on *certiorari* this Court will not examine the record "absent some extraordinary reason.").

ate impact model for review of subjective selection criteria. (Pet. Br. 35, 36, 47). While there are indeed some of the Circuits which have adopted the position advocated by petitioner, impact analysis of subjective criteria has only been consistently applied in four Circuits.[45] The better reasoned and more recent decisions of the remaining Circuits either directly support respondent or indicate approval of the authority followed in the case at bar.

In *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982) the Fifth Circuit first considered the suitability of applying the disparate impact model to analyze a claim that certain employment practices fell more harshly on blacks when no facially neutral employment practices were identified by the plaintiff. Among the challenged employment practices was the claim that Prudential used subjective criteria to evaluate its employees. The Fifth Circuit held that such practices were not the type of facially neutral employment practices to which the disparate impact model applies.

The Tenth Circuit considered this issue in a factual context which is quite similar to that presented by Watson. In *Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982), the plaintiff sought to apply impact analysis to a subjective evaluation system which determined who was selected for promotion. The Tenth Circuit rejected use of disparate impact analysis, holding that the subjective selection criteria "were not criteria an employee had to meet or test an employee had to pass in order to be considered" for the promotion.[46]

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[45] Sixth Circuit, *see, e.g., Rowe v. Cleveland Pneumatic Co., Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982); Ninth Circuit, *see, e.g., Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480-1486 (9th Cir. 1987) (*en banc*); Eleventh Circuit, *see, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1524-1525 (11th Cir. 1985); District of Columbia Circuit, *see, e.g., Segar v. Smith*, 738 F.2d 1249, 1270-1272, 1288 n.34 (D.C. Cir. 1984) *cert. denied*, 471 U.S. 1115 (1985).

[46] *Mortensen v. Callaway*, 676 F.2d at 824 n.1.

This same result was reached by the Eighth Circuit in *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981). The Court stated: "A subjective decision-making system, however, is not the type of practice outlawed in *Griggs*". *Harris v. Ford Motor Co.* at 611. The Eighth Circuit's rejection of use of impact analysis of subjective criteria was recently reaffirmed in *Paige v. Marsh*, No. 86-1282 (slip op; available on Lexis) (8th Cir. Feb. 3, 1987).

The position of the Fourth Circuit is in line with the Fifth Circuit's decision in *Pouncy*. Subjective employment practices are not appropriate for disparate impact analysis because of the lack of any "objective standard, applied evenly and automatically". *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274 (4th Cir. 1980). *See also*, *Brewster v. Barnes*, 788 F.2d 985, 993 (4th Cir. 1986). The Seventh Circuit also recognizes that claims which challenge the manner which employment practices are *applied* are inherently intent-based and must be tested under the treatment theory. In refusing to apply impact analysis to subjective criteria, the Court in *Coates v. Johnson & Johnson Co.*, 756 F.2d 524 (7th Cir. 1985) said that the essence of the plaintiff's claim did not involve rules which were facially neutral, but instead the plaintiff's complaint was that the rules were "more severely applied, through supervisory discretion", to blacks than to whites.[47] Where the issue is the manner a rule or requirement is *applied*, rather than the *effect* of the rule or requirement, the proper framework for analyzing the evidence presented is the disparate treatment model.

Perhaps the Second Circuit's opinion in *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590 (2d Cir. 1986) best characterized the paradoxical nature of Watson's position. On the one hand she attacks the bank's subjective evaluation system as being inherently suspect (hinting strongly of a claim of intentional

[47] *Coates v. Johnson & Johnson Co.*, 756 F.2d at 530-531 n.4.

discrimination), but on the other she claims that the bank's subjective evaluation system constitutes a facially neutral standard, appropriate for disparate impact analysis. The Court points out that when subjective criteria are at issue, it is "logically impossible to prove both propositions."[48] Judging from the manner Watson presented her case in the District Court, it appears that she recognized that impact analysis was not available to her and, accordingly, concentrated her efforts in an attempt to prove a disparate treatment case.

Although the recent decision of the Ninth Circuit, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*) differs with respondent on use of impact analysis to test subjective employment practices, *Atonio* is consistent with *Pouncy* in prohibiting use of the disparate impact model to attack an employer's overall selection process. Both the majority and concurring opinions make clear that impact analysis would be available only where the plaintiff (1) identifies a specific selection criterion, and (2) establishes a casual connection between the identified practice and the impact.

The D.C. and Eleventh Circuits have also held that the disparate impact model can be applied to subjective, multiple criteria. In *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), the Court, completely ignoring the availability of the disparate treatment model to analyze adverse impact against a protected group, reasoned that "limiting the disparate impact model to situations in which a single component of the process results in an adverse impact completely exempts the situation in which an adverse impact is caused by the interaction of two or more components." 755 F.2d at 1525. Further, the Court errs in suggesting that employers are better situated to identify the variable of their multi-component or multi-step selection process that caused the adverse impact. There is no merit to the Eleventh Circuit's suggestion. A two-equation regres-

[48] *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d at 605.

sion analysis will identify which variable, if any, is responsible for the challenged disparity.[49] The plaintiff can conduct that regression analysis as easily as can the employer. As this Court has observed, the liberal rules of discovery and plaintiff's access to the EEOC's investigatory files makes the plaintiff sufficiently well situated to explain the challenged employment decisions.[50] The Eleventh Circuit's holding on this issue was unnecessary and not consistent with this Court's decisions.

In *Segar v. Smith*, 738 F.2d 1249, 1271-72 (D.C. Cir. (1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985), the Court created its own hybrid disparate impact/disparate treatment model in which disparate treatment analysis is completely subsumed within disparate impact analysis. In *Segar*, the Court attempted to justify requiring the employer to pinpoint the employment practice in the subjective system at issue causing the disparity. The Court reasoned that after the employer effectively rebuts the disparate treatment claim by articulating a legitimate business reason for the disparity, the employer already will have identified which employment practices caused the observed disparity and, therefore, which employment practices it will have to validate as job-related under the disparate impact theory. 738 F.2d at 1271-72, 1288. The Court, therefore, not only required the defendant to prove the causation element of the plaintiffs' prima facie disparate impact case, but also rendered the disparate treatment model totally unnecessary. Under *Segar*, when the employer avoids liability under the disparate treatment theory by articulating a legitimate business reason, the plaintiff can, without any further proof, merely switch over to the disparate impact theory and require the employer to prove that the legitimate

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[49] *See*, Campbell, *Regression Analysis In Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law And Statistics Meet*, 36 Stan. L. Rev. 1299, 1312-1319 (1984).

[50] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

business reason is also a business necessity. Disparate treatment thereby would become completely subsumed within the disparate impact.

Segar further errs in suggesting that discriminatory intent is difficult to prove, necessitating an alternative method for plaintiffs to prove their cases. *Segar* incorrectly proposes that the *McDonnell Douglas* and *Burdine* framework may be abandoned, and the *Griggs* proof substituted, whenever a defendant articulates a nondiscriminatory reason for the challenged action. The *Segar* approach is further flawed in that it created a procedural scheme which allows the plaintiff to pursue a Title VII claim without giving the defendant notice of the claim to be advanced. Since the true focus of inquiry will not be identified until the defendant articulates it nondiscriminatory reason for the challenged employment action, the defendant is required to show the business necessity of employment practices which were not identified by the plaintiff. The hybrid procedural approach suggested by *Segar* is totally contrary to the carefully crafted analytical framework created by this Court and has no application to the case at hand.

As has been demonstrated, the better reasoned decisions of the Court of Appeals support respondent's position that impact theory should not be extended to analyze subjective employment criteria. The decision of the Fifth Circuit below is consistent with this Court's prior decisions and represents the most logical approach for the analysis of such subjective criteria.

CONCLUSION

In the above reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

Bruce W. McGee*
Joseph W. Spence
GANDY MICHENER SWINDLE
WHITAKER & PRATT
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102
(817) 878-0565

Attorneys for Respondent

*Counsel of Record

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CLARA B. WATSON, *Petitioner,*

v.

FORT WORTH BANK & TRUST, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Reply Brief for the Petitioner

ART BRENDER*
FRANK P. COLOSI
Brender, Casey & Colosi
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171

*Counsel of Record

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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ARGUMENTS

I. Contrary to the Contention in Points I and IV of Respondent's Brief, the Facial Neutrality Requirement of *Griggs vs. Duke Power Company* Does Not Elevate Form Over Substance by Restricting Disparate Impact Proof to Only "Objective" Practices.

The Respondent Fort Worth Bank & Trust's system of hiring and assigning employees to positions within the Bank was based solely on the subjective evaluations of its supervisors, who were given no standards either in writing or orally upon which to base their determinations.[1] (J.A. 161-81). The Bank's system for setting compensation was based on yearly evaluations prepared on the anniversary of each employee's date of hire and, though including written standards supposedly professionally developed, was nevertheless based on the subjective evaluation of the Bank's supervisors. (J.A. 52-62, 125-29, 194-95). The same supervisors who determined assignments prepared the yearly evaluations used to compute compensation, and upper management routinely approved these evaluations. (J.A. 58, 66-75, 125-29).

[1]Respondent and its amici struggled to carve up, and confine their argument to only one indistinguishable piece of the strikingly uniform practice by which the Bank – whether through hiring, promotion, transfer, or demotion – fills its vacant positions. The record in this case reveals the striking uniformity of the practice: "The evidence at trial demonstrated that a limited group of white department supervisors made all hiring and promotion decisions, as well as employee evaluations used to compute compensation, and that upper management routinely approved those decisions." *Watson vs. Fort Worth Bank & Trust*, 798 F.2d 791, 796 (5th Cir. 1986), and accordingly, the question this Court has chosen to review is whether "the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps [is] subject to the test of *Griggs vs. Duke Power Company*, 401 U.S. 424 (1971)."

The Bank never attempted to validate its assignment system. Claiming that its salary evaluations were "obtained from an outside consultant," the Bank never provided the name of the consultant or any evidence of validity of the standards applied. (R. II 46, 80). The Bank provided no statistical expert to rebut the overwhelming evidence of its personnel system's disparate impact.[2]

The Bank denied that it had any policy, overt or covert, that separately limited or classified black applicants and employees, yet claims its system should not be analyzed by disparate impact analysis because this Court's decisions restrict disparate impact to "objective" selection procedures. The Bank uses subjective employment selection procedures and claims subjective procedures are by definition, intentional and for that reason lack facial neutrality. This Court in *Griggs vs. Duke Power*

[2]The Respondent unfairly characterizes the testimony concerning the strength of Petitioner's statistical case. Providing no statistician of its own, the Respondent complained that Dr. Tom Marshall, Petitioner's statistician, had taken no account of the qualification of applicants in his statistical study. The Respondent's own vice-president in charge of personnel, Gary Shipp, however, confessed that he had in fact destroyed the records of these qualifications when he routinely destroyed the Bank's employment applications and continued to destroy them during the course of this litigation, leaving no records of employment qualifications to compare. (R.II 45, 46). At the class certification hearing, Mr. Shipp had testified that he could perceive no difference in the qualifications of blacks and whites who applied for employment, but he changed his testimony somewhat at trial and then claimed, strictly from memory, that whites overall had somewhat more experience. He admitted that this was an unreliable estimate. (J.A. 345-46, R.II 43, 45-50, 230-31).

The Respondent criticizes the failure of the Petitioner's statistical study to take into account the frequency of employees' expressions of interest in promotion, but this too was plainly the result of the Respondent's own actions. Vice-President Shipp testified that during the discovery stage of the litigation, he had advised the Petitioner's counsel that the Bank's sporadic recordkeeping of employees' expressions of interest in promotion was

Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) held that under Title VII ". . . practices, procedures, or tests neutral on their face, *and even neutral in terms of intent* (emphasis added), cannot be maintained . . ." if the practices have a disparate impact on minorities or women. 401 U.S. at 429. The clause "and even neutral in terms of intent" demonstrates that the Court considered practices "neutral on their face" to include some intentional practices. The sentence makes plain that the term facially neutral is not the same as unintentional but includes employment practices some of which intend to discriminate and some of which do not.

Artificial attempts to define facial neutrality by differentiating between objective and subjective employment practices are simply not justified by this Court's definition of disparate impact. In footnote 15 of this Court's Opinion in *Teamsters vs. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977), disparate impact is defined as follows:

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unreliable and incomplete. (R.III 339). The information was thus not available to examine statistically.

The Respondent's claim that the Petitioner's expert "based all of his analysis upon the dubious assumption that there were always job openings when black applicants sought employment at the Bank," is misleading on two accounts. In a pre-trial deposition, Vice-President Shipp's testimony was that the Bank hired from available applications and that applications were kept on file for a six-month period. (Shipp depo. 10, 26, R.II 45-67). For the first time at trial, Mr. Shipp claimed that he only considered two weeks' worth of applications. (R.II 57-66). Nevertheless, at trial, the Petitioner's expert analyzed this position. The result was a black hire rate of eight percent (8%) and a non-black hire rate of twenty-eight percent (28%), once again demonstrating a statistically significant disparate impact. (J.A. 85-88, 280). The Petitioner also showed that the two-week cut-off testimony was obviously erroneous since Mr. Shipp's own secretary, as well as other employees, had been hired after applying well in advance of the two-week cut-off. (R.II 64-67).

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. [Citation omitted] Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

431 U.S. at 335.

That the facially neutral practices are not defined by intent or lack of intent is obvious from the Court's comment in *Teamsters*, footnote 15, "Either theory [disparate treatment or disparate impact] may, of course, be applied to a particular set of facts." 431 U.S. at 335.

This Court has defined policies not facially neutral, as being facially or overtly discriminatory. "The Act proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation." *Griggs*, 401 U.S. at 431. A facially or overtly discriminatory policy is one that admits the discrimination. In *Dothard vs. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), the employer overtly discriminated against women as prison guards. In *Diaz vs. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), the employer overtly discriminated against men as flight attendants. In *City of Los Angeles vs. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), this Court characterized an overtly discriminatory pension fund. ("On its face, this plan discriminates on the basis of sex. . . ." 435 U.S. at 715). A policy which is overtly discriminatory and thus admits discrimination, requires the

same defense – that the policy in question is necessary to the safe and efficient operation of the business – as one that is facially neutral but with a disparate impact.

Clara Watson satisfied the requirement of facial neutrality in her challenge to the Bank's employment practices. The Bank's system of allowing its supervisors unfettered discretion in making subjective evaluations that determine the hiring, assignment and compensation of its employees is not overtly discriminatory. The Bank had no explicit or stated policy of classifying blacks differently than whites. Thus, the Bank's system is facially neutral and amenable to disparate impact analysis.

Finally, Respondent argues that subjective practices are individualized and that Petitioner "did not identify any aspect of Respondent's employment process suitable for testing under the *Griggs* model." Brief for Respondent at 34. Subjective judgments are frequently made on the basis of membership in groups and are not "individualized" at all. Judgments based on graduation from a particular school, geographic background, as well as gender and race, may often form the basis for subjective evaluations of individuals. Disparate impact analysis addresses facially neutral practices which adversely affect a group. Clara Watson's burden was to show the adverse effect of the Bank's practices on black employees. This she did. Thus, by inference she was a victim of those practices. This distinction was aptly addressed by Justice Powell's dissent in *Connecticut vs. Teal*:

> It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of

> cases – those involving direct proof of discriminatory intent – the Plaintiff seeks to establish direct, intentional discrimination against him. In that type of case, the individual is at the forefront throughout the entire presentation of evidence. In disparate-impact cases, by contrast, the Plaintiff seeks to carry his burden of proof by way of *inference* [emphasis by the Court] – by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of the disproportionately excluded group, was himself a victim of that process' "'built-in headwinds.'" *Griggs*, *supra* [citation omitted]. But this method of proof – which actually defines disparate-impact theory under Title VII – invites the Plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual.

457 U.S. at 458.[3]

Plainly, the Petitioner is entitled to have her proof tested by disparate impact analysis.

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[3]The often cited footnote 7 in *Furnco Construction Corp. vs. Waters*, 438 U.S. 567, 575 (1978) –

> This case did not involve employment tests, which we dealt with in *Griggs vs. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and in *Albemarle Paper Company vs. Moody*, 422 U.S. 405, 412-413, 95 S.Ct. 2362, 35 L.Ed.2d 280 (1975), or particularized requirements such as the height and weight specifications considered in *Dothard vs. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), *and it was not a "pattern or practice" case* like *Teamsters vs. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) [emphasis added]

– plainly distinguished *Furnco*, not only from earlier cases that had involved standardized tests or particularized requirements, but also from other cases involving group-wide discriminatory patterns.

II. This Court Clearly Held in *Connecticut vs. Teal* That the Legislative History of the 1972 Amendments to Title VII Recognized and Endorsed Application of the Disparate Impact Theory to Employment Systems with Discriminatory Effects.

The Respondent, together with the Solicitor General, claims that the legislative history of the 1972 Amendments to Title VII is entitled to little if any weight, because Congress did not "reenact" the entire statute, and because the Hawkins Bill, H.R. 1746, about which much of the legislative history was written, was not actually adopted, in lieu of a similar substitute bill. But these claims were put to rest conclusively by this Court in *Connecticut vs. Teal*, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982), where the Court plainly held that the 1972 Amendments, which extended the substantive protections of Title VII to employees of state and municipal governments, imprinted upon the substantive protections the 1972 legislative history which had approved the prior judicial establishment and applications of the disparate impact theory of discrimination. The Court held:

> The legislative history of the 1972 amendments to Title VII, 86 Stat 103-113, is relevant to this case because those amendments extended the protection of the Act to respondents here by deleting exemptions for state and municipal employers. *See* 86 Stat 103. That history demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting:
>
> > Employment discrimination as viewed today is a . . . complex and pervasive phenomenon.

> Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. S. Rep. No. 92-415, p. 5 (1971).

See also H.R. Rep. No. 92-238, p. 8 (1971). In addition, the section-by-section analyses of the 1972 amendments submitted to both houses explicitly stated that in any area not addressed by the amendments, present case law – which as Congress had already recognized included our then recent decision in *Griggs* – was intended to continue to govern. 118 Cong. Rec. 7166, 7564. (1972).

457 U.S. at 447 n.8.

In the course of applying to public employees the substantive protections of Title VII, the Supreme Court drew upon the 1972 legislative history and prior case law, and thus defined the substantive protections and the disparate impact theory in particular, in terms of systems and effects.[4] The same legislative history, which this Court therefore determined had endorsed the disparate impact approach as one of Title VII's substantive protections, made no distinction at all between the objective and the subjective – and in fact, contained clear references to certain subjective practices – among the discrim-

[4]Respondent cites footnote 39 of this Court's opinion in *Teamsters*, to support the Bank's claim that the 1972 legislative history is not relevant to an understanding of Title VII. In that footnote, Justice Stewart found no fault with the application of the legislative history of the 1972 Amendments to Title VII that the majority had made in *Franks vs. Bowman Transportation Co.*, 424 U.S. 747, 759-64 (1976). *Franks* held that the legislative history of the 1972 Amendments regarding the application of present case law to Title VII expressed Congressional intent to adopt disparate impact analysis as determined and developed by the courts at that time. This Court has re-affirmed the point in *Connecticut vs. Teal*. *See* text above.

inatory "systems" and "effects" the statute was designed to eliminate.[5]

III. The Guidelines of the United States Equal Employment Opportunity Commission Which Pertain to Employment Selection Procedures Have Been Construed to Apply and Have Applied Disparate Impact Analysis to Subjective Selection Procedures, Contrary to the Statements in Sections III, IV and V of Respondent's Brief.

A. *Section 6B of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. sec. 1607.6B, Addressing the Question of Validation of Selection Practices Which Exhibit Disparate Impact, Makes No Exception Based on the Objectivity or Subjectivity of the Practice.*

Both the Respondent and the Solicitor General claim Section 6B(1) of the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38295 (1978) (codified at 29 C.F.R. sec. 1607.6B(1)) provides an exception for subjective procedures, eliminating the need to demonstrate the business necessity for the procedures in the face of proven disparate impact. Both claim the Section subjects such procedures to no more than a test for disparate treatment.

Section 6B sets out what is required of the user of a selection procedure with disparate impact when the user "cannot or need not utilize the validation techniques contemplated by these guidelines." 29 C.F.R. sec. 1607.6B.

[5] *See* Brief for Petitioner on the Merits at 26-29, discussing the pre-1972 case law cited in the legislative history, which had applied disparate impact analysis to subjective employment practices.

What is required is that the employer "utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact" as more fully explained in the next two subsections. *Id.* The Respondent and Solicitor General cite only the next subsection, for their claimed exemption for subjective procedures. It reads as follows:

> (1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, *or otherwise justify continued use of the procedure in accord with Federal law.*

29 C.F.R. sec. 1607.6B(1) (emphasis added).

What the Respondent and the Solicitor General fail to point out, however, is that the Guidelines set up *exactly the same requirements* where an employer is unable to validate *objective* procedures. The very next subsection covers objective procedures and reads as follows:

> (2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact *or otherwise justify continued use of the procedure in accord with Federal law.*

29 C.F.R. sec. 1607.6B(2) (emphasis added).

Thus, the enforcing administrative agency has carved out no special exception for subjective procedures, but rather has treated both objective and subjective procedures the same when more technical validation is not possible. The Respondent and Solicitor General disregard this parallelism and attempt to rework this section of the Guidelines into a requirement of disparate treatment analysis permitted only for subjective employment selection procedures. The Respondent and amicus would have the Court interpret the Guidelines' requirement that the procedure be justified in "accord[ance] with federal law" as requiring an employer to articulate a legitimate nondiscriminatory reason for the employer's maintenance of the *entire employment selection procedure shown to have disparate impact*. Presumably, the employer would have the burden of proof in this regard. The scheme has no support in any prior case law and is certainly not supported by this Court's decision in *Griggs vs. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The Solicitor General's suggestion that the justification for disparate impact required by Section 6B may be satisfied ". . . by showing that the selection procedure is reasonably related to the requirements of the job or other business needs and has been applied in a nonpretextual fashion, *as the employer would do in any disparate treatment case* [emphasis added], . . ."[6] does concede, in spite of the awkward allusion to disparate treatment, that disparate treatment analysis is *not* appropriate where subjective employment procedures have a group-wide disparate effect, since disparate treatment analysis requires articulation of a legit-

[6]Brief for the United States as Amicus Curiae supporting Respondent at 27.

imate business reason for only a *particular* employment decision, *not* the *selection process itself*. But *Griggs* required proof of business necessity of the employer to justify any practice having a proven disparate impact. There is neither authority nor logic for changing that burden.

Despite the Solicitor General's attempts to claim otherwise in his brief, the Equal Employment Opportunity Commission has clearly and consistently insisted that where technical validation is not possible, Section 6B still requires proof of business *necessity*. Effective May 2, 1980, the EEOC promulgated a series of questions and answers designed to "clarify and interpret but not to modify" the Uniform Guidelines on Employee Selection Procedures that had been adopted August 25, 1978. Question 36 of the clarification and interpretation clearly addressed the present issue:

> The following questions and answers (36-81) assume that a selection procedure has an adverse impact and is part of a selection process that has an adverse impact.
>
> 36. Q. How can users justify continued use of a procedure on a basis other than validity?
>
> A. Normally, the method of justifying selection procedures with an adverse impact and the method to which the Guidelines are primarily addressed, is validation. The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. *See* Section 6B. In *Griggs vs. Duke Power Co.*, 401 U.S. 424, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a "business neces-

> sity" for its continued use; *therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of a selection procedure.*

U.S. Equal Employment Opportunity Commission, Uniform Guidelines on Employee Selection Procedures: Interpretation and Clarification, 44 Fed. Reg. 11996 (1979) (emphasis added).

Section 6B offers no solace to Respondent in its attempt to find an exception in the wording of the Guidelines. The Guidelines and the EEOC's interpretation of them make no distinction between subjective and objective procedures, either in the general applicability of disparate impact analysis to the procedures or in the specific requirement of business necessity as the only sufficient justification for the maintenance of employment selection procedures that regularly and adversely affect members of protected groups.

B. *The Respondent Has Produced No Evidence in the Case at Bar even Attempting to Show Either the High Cost or Impossibility of Validating the Bank's Employment Practices, and No Evidence that Either the Cost or the Feasibility of Validation is Generally and Substantially Influenced by the Subjectivity or Objectivity of the Practices.*

The Respondent has produced no evidence in this record to support its claim that the validation of subjective procedures is more burdensome, difficult or expensive than the validation of objective procedures. Nor has it produced any evidence that its particular employment

procedures or that any other subjective procedures are impossible to validate.

The evaluation and balancing of the competing cost considerations of alternative policies are best left to the Congress and the administrative agencies charged with the enforcement of Title VII. Certainly, the record before this Court is devoid of any evidence as to the cost or impossibility of validation procedures that could justify striking new balances and discarding existing policies.

The authorities cited in the briefs of the Respondent and the Solicitor General are hardly sufficient bases for making a judgment of this magnitude. The cost estimates presented by the Solicitor General can arguably apply to the validation of either subjective or objective employment procedures, and thus, are not responsive to the issue before the Court. One authority, an article, Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633 (1979) cites no basis whatsoever for its bare assertion that a validation could cost from twenty to one hundred thousand dollars.[7] The reasonableness of the costs asserted and of the elaborate validation techniques assumed in the Gwartney article, have been called into question by others,[8] and the article and the Solicitor General altogether ignore the payoff of validation studies:

[7]Another study on this point cited by the Solicitor General, A. Outerbridge, Personnel Res. and Dev. Ctr., OPM, *TM-79-18, A Survey of Test Validation Study Costs*, (Aug. 1979), is not in general circulation, and perhaps unpublished.

[8]Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35 (1985).

> While a validation study has costs associated with it, it is possible to calculate the payoff available to the organization from the use of valid selection procedures; in most cases, this payoff will be appreciable. Numerous reviews have found criterion-validity studies to be highly cost effective [citing authorities].

Doverspike, Barrett & Alexander, *The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness*, 9 Law & Psychology Rev. 35, 42 (1985).

The Respondent's and its amici's cries that validation of subjective employment procedures is impossible are also without merit. This Court has long recognized the professional standards for validation promulgated by the American Psychological Association. *See, e.g., Albemarle Paper Co. vs. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The amicus brief of the Association on behalf of this Petitioner clearly attests to the practicality of applying its professional standards for validation to subjective employment selection devices. In response, the Solicitor General relies upon Professor Edwin Ghiselli[9] and others to broadly proclaim:

> Accordingly, commentators in the legal, industrial psychology, and personnel administration professions have almost uniformly stated that subjective selection processes do not have the "technical reliability" [footnoting to Ghiselli] that is a necessary precondition of validation or other formal substantiating method.

Brief for the United States as Amicus Curiae supporting Respondent at 20-21.

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[9]E. Ghiselli, *Theory of Psychological Measurement* 208 (1964).

Two years after his book, cited by the Solicitor General, had been published, Professor Ghiselli published the results of his successful validation of a subjective personnel interview process, and found:

> In conclusion, it can be said that the ordinary personnel interview is not necessarily invariably invalid, but its validity may be at least equal to, if not greater than, the validity of tests.

Ghiselli, *The Validity of a Personnel Interview*, 19 Personnel Psychology 389, 394 (1966).

Numerous studies belie the claim that subjective criteria are not amenable to formal validation procedures.[10] Even the amici on behalf of the Respondent, the American Society for Personnel Administration, and the International Personnel Management Association, who agree with Petitioner that the "objective"-"subjective" distinction is irrelevant, have themselves published considerable literature dealing with the application of the EEOC Guidelines to subjective employment practices. The official publication of the American Society for Personnel Administration, Personnel Administrator, and the official publication of the International Personnel Manage-

[10] *See, e.g.*, Brief for the American Psychological Association as Amicus Curiae in support of the Petitioner; Arvey, *Unfair Discrimination in the Employment Interview: Legal and Psychological Aspects*, 86 Psychological Bull. 736 (1979); Arvey & Campion, *The Employment Interview: A Summary and Review of Recent Research*, 35 Personnel Psychology 281 (1982); Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 987-88 (1982) (and see cases cited therein); Kraiger & Ford, *A Meta-Analysis of Ratee Race Effects in Performance Ratings*, 70 J. Applied Psychology 56 (1985); Landy & Farr, *Performance Rating*, 87 Psychological Bull. 72 (1980); and Schmidt, Hunter & Pearlman, *Validity Generalization Results for Tests Used to Predict Job Proficiency and Training Success in Clerical Occupations*, 65 J. Applied Psychology 373 (1980).

ment Association, the Public Personnel Management Journal, have stressed both the necessity and the practicality of complying with the EEOC Guidelines where subjective employment procedures are involved.[11]

Nevertheless, lower courts have not infrequently relieved employers of the need to submit their practices, whether subjective or objective, to formal validation when it is impractical – instead finding the requisite business necessity if only the otherwise unstructured practice is standardized and therefore reliable, *Gillespie vs. State of Wisconsin*, 771 F.2d 1035 (7th Cir. 1985), or if the practice is informally validated by expert testimony or expert public documents, *Davis vs. City of Dallas*, 777 F.2d 205 (5th Cir. 1985), or by generalizable judicial precedents, *Aguilera vs. Cook County Police and Corrections Merit Board*, 760 F.2d 844 (7th Cir. 1985); *Smith vs. Olin Chemical Corp.*, 555 F.2d 1283 (5th Cir. 1977); or by a tradition of generations of use, *Zahorik vs. Cornell University*, 729 F.2d 85 (2nd Cir. 1984); or even by the plausibility of the employer's bare argument, *Yuhas vs. Libbey-Owens-Ford Company*, 562 F.2d 496 (7th Cir. 1977). This Court once found the requisite "manifest relationship to the employment in question" when the employer's legitimate objectives were "significantly

[11] *See, e.g.*, Curry, *A Common-Sense Management Approach to Employee Selection and EEO Compliance for the Smaller Employer*, 26 Personnel Admin. 35 (1981); Davey, *Personnel Testing and the Search for Alternatives*, 13 Pub. Personnel Mgmt. J. 361 (1984); Gatewood & Ledvinka, *Selection Interviewing and EEO: Mandate for Objectivity*, 24 Personnel Admin. 51 (1979); Holmes, *What's Ahead for Personnel Professionals in the '80s?*, 25 Personnel Admin. 33 (1980); Sackett, *A Critical Look at Some Common Sense Beliefs about Assessment Centers* 11 Pub. Personnel Mgmt. J. 140 (1982); and Schanie & Holley, *An Interpretive Review of the Federal Uniform Guidelines on Employee Selection Procedures*, 25 Personnel Admin. 44 (1980).

served by – even if they do not require" his use of a racially inequitable practice. *New York City Transit Authority vs. Beazer*, 440 U.S. 568, 587 n.31 (1979). But the strength of proof of business necessity which ought to be required from an employer defending against prima facie evidence of disparate impact, and certainly the costs of proof, are not here at issue; this case involves only a plaintiff employee's right to attempt to prove unlawful discrimination under the disparate impact theory.

C. *Contrary to Respondent's Argument in Section III of its Brief, the Equal Employment Opportunity Commission Has Consistently and Recently Applied Disparate Impact Analysis to Subjective Employee Processes.*

The Respondent argues that the Solicitor General's amicus brief and a single unpublished decision, *Ziman vs. U.S.P.S.*, No. 01842595 (July 23, 1986), support its claim that "a subjective selection process cannot be facially neutral" and thus cannot be subject to the disparate impact doctrine. Brief for Respondent at 32-33. *Ziman vs. U.S.P.S.* is not a published decision of the Equal Employment Opportunity Commission. It is, rather, an appeal from an administrative decision of the United States Postal Service, written by a hearing officer for the Office of Review and Appeals. It makes no mention whatsoever of the EEOC Guidelines, interpretations, or even previous EEOC decisions. It makes no mention of the position publicly taken and strenuously argued by the EEOC just months earlier, in a published decision of the Eighth Circuit.

In *EEOC vs. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986), the EEOC challenged the subjective hiring practices of Rath Packing, using disparate impact analysis. The challenged practices and defensive positions of Rath sounded very much like the practices and positions argued by the Respondent in the case at bar:

> Rath's office manager, Walter McFarland, was responsible for accepting and maintaining applications and selecting applicants for employment. The plant superintendent had the authority to overrule McFarland's choice of applicants but seldom did so. Rath had no written or otherwise established selection guidelines and McFarland was unable to identify what information was deemed significant in evaluating and selecting applicants. . . .
>
> . . . .
>
> Rath next argues that the District Court erred in holding that there was no business necessity for Rath's subjective hiring practices. Rath had no established criteria for selecting employees. . . .
>
> . . . EEOC also argues that Rath failed to establish that the subjective hiring procedures were necessary or essential and that there were no alternative practices with less discriminatory effect.
>
> . . . .
>
> . . . After EEOC established the *disparate impact of the subjective hiring practices*, Rath had the burden of producing evidence of business necessity and the burden of persuasion on that issue.

787 F.2d at 322, 327-28 (emphasis added).

Rath Packing reveals that the EEOC, less than two years ago, vigorously prosecuted a nearly bankrupt employer for its subjective hiring practices, applied the

disparate impact theory of proof, and prevailed. The EEOC and the other enforcing agencies have undertaken no administrative action in an attempt to change in any way their Guidelines or interpretations of the Guidelines. The position they have taken in this lawsuit is foreign to their own Guidelines, their own decisions, and their own recent litigation.

CONCLUSION

The Judgment of the Court of Appeals, upholding the Judgment of the District Court, insofar as it prohibited the Petitioner from having her case analyzed under the disparate impact theory, should be reversed.

Respectfully submitted,

ART BRENDER

FRANK P. COLOSI

BRENDER, CASEY & COLOSI
930 Capital Nat'l Bank Bldg.
110 W. 7th St.
Fort Worth, Texas 76102
817/334-0171

Attorneys for Petitioner

(9)

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In the Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON, PETITIONER

v.

FORT WORTH BANK AND TRUST

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

GLEN D. NAGER
Assistant to the Solicitor General

DAVID K. FLYNN
ROBERT J. DELAHUNTY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CHARLES A. SHANOR
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether the decisions resulting from a subjective promotion process are subject to challenge under the disparate impact analysis approved by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6139

CLARA WATSON, PETITIONER

v.

FORT WORTH BANK AND TRUST

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The Attorney General and the Equal Employment Opportunity Commission (EEOC) have significant Title VII enforcement responsibilities. See 42 U.S.C. 2000e-5. The United States, as the nation's largest employer, is also subject to Title VII obligations. Finally, the proper interpretation of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, promulgated by various agencies of the United States in 1978, is also at issue here.

STATEMENT

1. Petitioner, Clara Watson, is a black woman. She was hired in August 1973 by respondent, Fort Worth Bank & Trust, as a proof operator; in January 1976, respondent promoted her to a position as a teller in its motor bank; and, in February 1980, it promoted her to a position as a commercial teller in its main lobby (J.A. 205). During the next year, petitioner applied unsuccessfully on four occasions for promotion to supervisory

positions (J.A. 205-206). In August 1981, she resigned from her employment with respondent (J.A. 192-194).

2. On October 1981, petitioner filed this Title VII action (42 U.S.C. 2000e *et seq.*), alleging that respondent had discriminated against her and other blacks in hiring, promotion, and other employment decisions (J.A. 178, 206). On motion, the district court certified petitioner to represent a class consisting of all blacks who had applied to, would apply to, or were employed by respondent on October 21, 1979, or any time thereafter (J.A. 190).

At trial, petitioner recounted her employment history and her unsuccessful attempts to obtain promotion to a supervisory position (J.A. 4-50). She further showed that respondent had no black directors or officers, that only one black had held a supervisory position during the 1975-1983 period, and that blacks constituted only 13% of respondent's workforce during the 1981-1983 period (J.A. 194). Finally, petitioner had a statistician testify, based on limited applicant flow and other data, that a black applicant had one-fourth the chance of a white applicant to get a job with respondent; that a black employee was likely to receive approximately $46.00 less per month than a white employee would receive for comparable work; and that respondent had advanced black employees at a rate six-tenths of a pay grade per year more slowly than similarly situated white employees (J.A. 242-250).

Respondent countered with evidence explaining why petitioner had not been promoted (J.A. 190-194, 196-197). In addition, respondent showed that an outside consultant had designed its promotion and evaluation process, that the process had been structured to inform employees of the standardized criteria by which they would be judged,[1] and that the process assured employees that they would be evaluated by the supervisors with whom they worked on a daily basis, subject only to

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[1] The standardized criteria, as to which supervisors were required (at least for salary evaluation purposes) to assign point values, included accuracy of work, alertness, personal appearance, supervisor-co-worker relations, quantity of work, physical fitness, attendance, dependability, stability, ambition, friendliness, courtesy, job knowledge, and experience. See J.A. 131-135, 137-138, 246 n.26.

general review (and rare reversal) by respondent's highest officials (J.A. 194-195; II Tr. 80-92). Respondent also pointed out that petitioner's sample size was in many respects too small for drawing legitimate statistical inferences and that her statistician had not considered the relative qualifications of the persons in the applicant pool, the distribution of applicants for specific openings, or the influence of market factors (II Tr. 181-196). Finally, respondent demonstrated that blacks comprised 11.8%, 10.2%, and 22.8% of the population of the county, metropolitan area, and city, respectively (J.A. 202).

Based on this evidence, the district court found (J.A. 199-201) that existing black employees (such as petitioner) did not share a common question of law or fact with nonemployee applicants and that existing employees formed too small a group to satisfy the "numerosity" requirement of Fed. R. Civ. P. 23(a); accordingly, it subdivided the class into applicants and employees and held that petitioner could not advance claims on behalf of either class (J.A. 207). On the merits, the court held that respondent's articulated reasons for failing to promote petitioner were not pretextual and that, although petitioner "made allegations of discrimination by defendant in hiring, compensation, initial placement, promotions, * * * and other terms and conditions of employment, there [was] little or no evidence of discrimination in these categories" (J.A. 197, 201). Finally, after finding that petitioner had "proceeded zealously on behalf of the group of blacks who applied for employment [with] the [b]ank," it ruled that "no discrimination against blacks as a class ha[d] been proved on the basis of defendant's hiring practices" (J.A. 202).

3. The court of appeals affirmed in part and reversed in part (J.A. 204-252). It rejected petitioner's argument that the district court had abused its discretion in decertifying the class and in holding that petitioner was not a proper class representative (J.A. 208-212). On the merits, it held that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model" (J.A. 213), that there was "no indication in the record, nor [was] there any suggestion * * * by [petitioner], * * * that the district court neglected to consider the

statistical evidence presented by [petitioner] in terms of evaluating the credibility of the [respondent's] proffered explanations for its promotion decisions" (J.A. 214 n.13), and that "the district court's finding that the [b]ank's explanations for its action were not pretexts for discrimination is not clearly erroneous" (J.A. 215). Finally, the court held that the hiring discrimination claims of the applicant class should have been dismissed without prejudice (since there was no proper class representative); it remanded the case for this purpose (J.A. 217-218).[2]

SUMMARY OF ARGUMENT

A. Disparate treatment was the principal evil Congress had in mind when it enacted Title VII. The Title VII enforcement community soon observed, however, that employers were continuing to use standardized tests and other objective credential requirements which often had an adverse exclusionary effect on members of groups protected by Title VII and which bore no manifest relationship to the employment in question. It was in response to this concern that the Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), first approved use of disparate impact theory as a means of establishing unlawful employment discrimination. The Court held that a Title VII violation may be stated without proof of motive where an objective selection device disproportionately excludes protected individuals from employment opportunities and is not "manifestly related" to the requirements of the job. The Court has consistently reaffirmed that holding where objective selection devices have been in issue. But the Court has also been unwilling to accept the general proposition that a showing that an employment practice has an adverse effect on members of a protected group is always sufficient to establish a prima facie Title VII violation. Indeed, the Court has at least twice implied that, in challenges to sub-

[2] Judge Goldberg dissented (J.A. 219-252). He agreed with petitioner that the district court had abused its discretion in decertifying the plaintiff class and in failing to find that a pattern and practice of class-wide disparate treatment existed (J.A. 222-236, 236-251). He thus found "it unnecessary to decide whether [petitioner] could have proceeded under a disparate impact model as well" (J.A. 237 (footnote omitted)).

jective selection processes, only disparate treatment, and not disparate impact, theory applies. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567 (1978).

B. Disparate treatment theory provides the protection that Congress intended against any discriminatory animus or cultural bias that may arise from the use of subjective selection processes. Selection processes are subjective when they are discretionary and nonmechanical and depend upon the mental operations of the decisionmaker. This Court has routinely rejected arguments that disparate treatment analysis is unsuited to the task of examining the legality of subjective selection devices. Courts have often found disparate treatment to exist where a subjective selection process with an adverse impact has inexplicably been used. That petitioner failed to prevail on her disparate treatment claim here does not show that disparate treatment analysis is an inadequate response to discriminatory subjective decisionmaking; it shows rather that petitioner failed to convince the courts below that she was a victim of such discriminatory decisionmaking.

C. Extending disparate impact theory to employee selections resulting from subjective processes would undermine other policies with which Congress was concerned in adopting Title VII. Disparate impact analysis is simply not suited to investigating whether the decisionmaking processes that constitute subjective selection procedures are discriminatory or not. A defendant could rarely, if ever, validate or otherwise formally substantiate its subjective judgments. Subjective judgments typically assess intangible qualities, which cannot be measured in the manner that is necessary for validation or other formal substantiation. Accordingly, applying disparate impact theory to the decisions resulting from subjective selection processes would inevitably lead employers either to abandon subjective processes or, where such replacement is too burdensome, restrictive, or expensive, to superimpose numerical quotas on employment systems using subjective devices. Neither result would be consistent with the intent of the 1964 Congress.

D. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607 (1978), do not provide that subjec-

tive selection processes must be validated or otherwise formally substantiated. On the contrary, the Guidelines provide that, where a subjective selection process is in issue, an employer may "justify continued use of the procedure in accord with Federal law." The United States and the EEOC believe that an employer can justify "continued use of the procedure in accord with Federal law" by showing that its recourse to and application of a particular subjective selection process is reasonably related to the requirements of the job or other business need, as in any disparate treatment case.

ARGUMENT

THE DECISIONS RESULTING FROM A SUBJECTIVE PROMOTION PROCESS MAY BE SCRUTINIZED EFFECTIVELY UNDER THE DISPARATE TREATMENT ANALYSIS AND SHOULD NOT ALSO BE SUBJECTED TO CHALLENGE UNDER THE DISPARATE IMPACT ANALYSIS

Petitioner contends that the outcomes of subjective promotion processes like that employed by respondent must pass muster under the disparate impact analysis of *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Based on our understanding of the Court's cases (including *Griggs* itself), our experience in administering Title VII of the Civil Rights Act, the balance struck by Congress in 1964, and the Uniform Guidelines on Employee Selection Procedures, we submit that this Court should join the courts below in rejecting petitioner's contention.

A. Disparate Impact Analysis has Been Applied Only to Selection Devices That Do Not Assess Each Person's Suitability for Employment in an Individualized Way

We begin by placing the Court's disparate impact decisions in historical perspective. This Court has said, and the legislative history of the 1964 enactment makes clear, that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15 (1977). In the wake of the statute's passage, however, another more subtle form of discrimination became of increasing concern to the Title VII enforcement com-

munity. Employers, often in good faith and without intent to discriminate, continued to use standardized tests and other credential requirements to select among competitors for hiring and promotion. Such devices provided an easily applied (albeit approximate) measure of employee quality, were inexpensive to administer, produced consistent and comparable results, and, by limiting personnel officers' discretion, served to provide assurance that Title VII's proscription against intentional discrimination was being obeyed.[3] Title VII enforcement officials became concerned, however, that use of these objective selection devices had an unjustified exclusionary effect on members of protected minority groups, because of such factors as underlying patterns of educational and cultural deprivation (or other factors beyond those individuals' control), which assumed undue prominence in respect to such devices.[4] Accordingly, Title VII enforcement officials and other civil rights advocates increasingly began to argue that Congress had intended to prohibit employers from using any objective selection device that overstates or misstates what is necessary for competent job performance.

It was against this background that the Court in *Griggs* first approved use of disparate impact theory as a means of establishing unlawful employment discrimination under Section 703(a)(2) of the statute.[5] At issue in *Griggs* were a written aptitude test and a high school diploma requirement that the Duke

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[3] See W. Byham & M. Spitzer, *The Law and Personnel Testing* 62 (1971); Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1637-1638 (1969).

[4] See Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. Indus. & Com. L. Rev. 473, 483-488 (1966); Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1114-1115, 1120-1141 (1971); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 Colum. L. Rev. 691, 706-712 (1968).

[5] Section 703(a)(2) of the statute makes "[i]t unlawful • • • for an employer • • • to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2(a)(2)).

Power Company had adopted, according to the district court, for the non-discriminatory purpose of improving the general quality of the workforce. Reversing the court of appeals' holding that, in the absence of a discriminatory purpose, Title VII did not prohibit the use of such objective selection devices, this Court observed that "[t]he objective of Congress in the enactment of Title VII * * * was to achieve equality of employment opportunities and [to] remove barriers that have operated in the past to favor an identifiable group of white employees over other employees" (401 U.S. at 429-430). The Court stated that "Congress has now required that the posture and condition of the job-seeker be taken into account" (*id.* at 431) and that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"; rather, the Court said, in such situations "Congress has placed on the employer the burden of showing that any given requirement * * * ha[s] a manifest relationship to the employment in question" (*id.* at 432).

The decision in *Griggs* thus responded directly to the Title VII enforcement community's concern that nondiscretionary selection devices, by failing to give individualized consideration to a person's ability to perform a job, unnecessarily exclude protected employees from substantial employment opportunities.* Where such objective, facially neutral selection devices have been at issue, the Court has consistently reaffirmed that a Title VII violation may be established without a finding of discriminatory purpose. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975) (written tests); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements); *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979) (anti-narcotics rule); *Connecticut* v. *Teal*, 457 U.S. 440 (1982) (written examination).

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* In a brief amicus curiae in *Griggs*, the United States asked the Court to respond to the exclusionary problems created by these nondiscretionary selection devices. Contrary to petitioner's suggestion (Br. 16-17), the United States did not in that brief argue that disparate impact theory should be applied to all conceivable selection processes. For the Court's convenience, we are lodging copies of our brief in *Griggs* with the Clerk.

Contrary to petitioner's argument (Br. 15-20), however, the Court has not treated disparate impact analysis as the rule and disparate treatment analysis as the exception. In fact, the Court since *Griggs* has refused to accept the proposition that a prima facie Title VII violation may be established without proof of discriminatory motive in *every* circumstance in which an employment practice or combination of employment practices has an adverse effect on a protected group. Thus, in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n.20 (1978), the Court rejected the contention that the adoption of a gender neutral pension plan "would itself violate Title VII because of its disproportionately heavy impact on male employees. Cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424." The Court said (435 U.S. at 711 n.20):

> * * * [U]nder Title VII * * * the male employees would not prevail. Even a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences.

Moreover, where non-mechanical selection processes have been in issue, the Court has consistently inquired only whether Title VII plaintiffs have successfully proven—by statistics or other evidence—the presence of discriminatory motivation. See, *e.g.*, *Bazemore* v. *Friday*, No 85-93 (July 1, 1986); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977); *Teamsters* v. *United States*, *supra*. Indeed, the Court has at least twice strongly implied that disparate impact theory is inapplicable in challenges to subjective selection processes.

McDonnell Douglas Corp. v. *Green*, 441 U.S. 792, 805-807 (1973), concerned a discretionary decision not to rehire an individual who had participated in unlawful conduct directed against an employer. Contrasting such a decision with the type of mechanical decisionmaking processes that were in issue in *Griggs*, the Court noted (411 U.S. at 806 (citation omitted)) that *Griggs*

> dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired posi-

> tions. *Griggs* was rightly concerned that childhood deficiencies in * * * education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Respondent, however, appears in different clothing. * * * [His employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification * * *. [His employer] assertedly rejected [him] for unlawful conduct * * * and * * * this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

Accordingly, the Court did not require the employer to demonstrate that its subjective refusal to rehire had a manifest relationship to the requirements of the job (*id.* at 805-806).[7]

In *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 572, 575 (1978), the Court expressly refused to apply the disparate impact analysis to an employer's practice of hiring only those persons whom his superintendent knew were experienced or had been recommended. The Court contrasted the selection device in issue there with "employment tests * * * or particularized requirements such as * * * height and weight specifications" (*id.* at 575 n.7), as were involved in *Griggs*, *Albemarle Paper Co.*, and *Dothard* v. *Rawlinson*.[8]

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[7] As petitioner notes (Br. 22), there was no evidence of group-wide disparate impact in *McDonnell Douglas*. But that is not the reason the Court gave for rejecting application of the *Griggs* "manifest relationship" requirement; rather, the Court in *McDonnell Douglas* said that the employer was not subject to the more stringent *Griggs*-defense because the challenged practice was a "predictive evaluation resistant to empirical proof" (411 U.S. at 806 n.21).

[8] Petitioner seeks to distinguish *Furnco* (Br. 23) on the ground that there was no showing that the employer's hiring practices had a disparate impact. But this distinction does not explain why the Court "foreclose[d] on remand further litigation on the *Griggs* question of whether [the employer's] hiring practices had a disparate impact" (*Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 583 (Marshall, J., dissenting)). That is why various commentators have concluded that the Court in *Furnco* held disparate impact theory inapplicable in challenges to subjective selection processes. See, *e.g.*, 3 A. Larson & L.Larson, *Employment Discrimination* § 76.32, at 15-83 to 15-85 (1986)

McDonnell Douglas and *Furnco* illustrate that the Court has heretofore declined to extend the disparate impact analysis beyond the particular form of employment discrimination associated with the use of objective, mechanical selection devices. It has said that an employer "limit[s], segregate[s], or classif[ies] his employees or applicants" within the meaning of Section 703(a)(2) when, by using such a device, the employer separates individuals into uniformly defined groups from which ultimate employment decisions will be made; and where the device is not job-related and has a statistically significant adverse effect on members of a protected group, the Court has said that the "limit[ation], segregat[ion], or classif[ication]" "deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect[s] his status as an employee, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-2(a)(2)). But the Court has also strongly implied that an employer does not "limit, segregate, or classify his employees or applicants" within the meaning of Section 703(a)(2) when it makes subjective decisions about particular employees or applicants, even though a series of those decisions may cumulatively result in a numerical or proportional racial disparity in the employer's workforce.[9] Rather, the Court has indicated that such cases are properly treated as

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[hereinafter Larson]; Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After* Beazer *and* Burdine, 23 B.C. L. Rev. 419, 438-439 (1982); AFL-CIO Br. at 10-11, in *Connecticut* v. *Teal, supra.*

[9] See *McDonnell Douglas Corp.*, 411 U.S. at 805-806; *Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 575 n.7, 578; *Teamsters*, 431 U.S. at 334-336, 339-340 n.20.

Where mixed-component or multi-step selection processes are involved, of course, the Court has said that a plaintiff may challenge any objective component of that process for its own disparate impact. See *Connecticut* v. *Teal, supra.* But petitioner has not attempted to do so in this case. Rather, she challenges the selection process as a whole, which she characterizes as subjective and discretionary. See Pet. Br. 4-6, 40, 47-48. Because the selection process includes both objective factors and subjective discretion, we agree that it should be treated as subjective and further submit that it should be challengeable only under the disparate treatment theory. See Larson § 76.34, at 15-85 to 15-86, 15-91 to 15-98.

arising under Section 703(a)(1) of the statute[10] and as involving only a possible "pattern or practice" of intentional discrimination.[11]

B. Disparate Treatment Analysis Provides Ample Protection Against Possible Discriminatory Animus or Cultural Bias Arising from the Use of Subjective Selection Devices

Petitioner's principal reason for suggesting that disparate impact analysis should be applied to subjective selection devices is (Br. 34-44) that, in her view, disparate treatment analysis does not provide sufficient protection against the discriminatory animus or cultural bias that may arise from the application of those devices. We disagree.

1. Subjective selection devices involve, in this Court's words, "predictive evaluation[s]" that are "resistant to empirical proof" (*McDonnell Douglas Corp.*, 441 U.S. at 806 n.21). Such devices include decisional components of unstructured personnel processes (*e.g.*, personal interviews for purposes of hiring

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[10] Section 703(a)(1) provides that it is "unlawful • • • for an employer • • • to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (42 U.S.C. 2000e-(2)(a)(1)).

The Court, of course, has never resolved whether a finding of discriminatory motive is necessary in all cases properly characterized as arising under Section 703(a)(1). See *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 141-145 (1977). Nor need it decide that question here. This case concerns only whether a challenge to a series of subjective selection decisions requires a finding of discriminatory motive, and not whether every challenge properly characterized as arising under Section 703(a)(1) requires such a finding.

[11] See *Bazemore* v. *Friday*, slip op. 10-13; *Hazelwood School Dist.*, 433 U.S. at 306-313; *Teamsters*, 431 U.S. at 334-340.

Petitioner's suggestion (Br. 22-23) that the subjective practices in issue in *Hazelwood* and *Teamsters could* successfully have been challenged under the disparate impact theory is nothing more than a bootstrapping of her argument that subjective selection processes *should* be subjected to disparate impact analysis. Moreover, it is inconsistent with the statement in *Teamsters* (431 U.S. at 339-340 n.20 (emphasis added)) that "statistical evidence [cannot be] offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance *are probative* in a case such as this one *only because* such imbalance is often a telltale sign of *purposeful discrimination*."

decisions, or supervisor ratings based on personal experience with candidates for purposes of promotion decisions) and assessments based on unstructured weighing of specified objective considerations (such as grades, prior experience, and references). The common attribute of subjective selection processes is their reliance on judgment, intuition, and discretion.[12] Mental operations such as these are, of course, the focus of disparate treatment analysis and this Court has repeatedly rejected arguments that this analysis is inadequate to its task. See, *e.g.*, *U.S. Postal Serv. Bd. of Govs.* v. *Aikens*, 460 U.S. 711, 716-717 (1983); *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256-260 (1981).

The Court's confidence in disparate treatment analysis is equally appropriate here. Courts applying disparate treatment analysis have consistently found decisions resulting from inexplicable and unwarranted recourse to subjective selection processes to be motivated by discriminatory intent. See generally B. Schlei & P. Grossman, *Employment Discrimination Law* 191-205 (1983); Denis, *Subjective Decision Making: Does it Have a Place in the Employment Process?*, 11 Empl. Rel. L.J. 270-276 (1985). Courts are well aware that subjective selection processes are "vulnerable to either conscious or unconscious discrimination by the evaluating supervisors" (*Wade* v. *Mississippi Coop. Ext. Serv.*, 528 F.2d 508, 518 (5th Cir. 1976)), especially where the evaluating supervisor is of a race or sex different from that of the applicant (see, *e.g.*, *Royal* v. *Missouri Hwy. & Transp. Comm'n*, 655 F.2d 159, 164 (8th Cir. 1981); *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981)). Likewise, courts have found discriminatory treatment where the employer has no substantial job or business-related reason for employing an entirely subjective selection process—as is often true when the employer is filling jobs that require minimal or easily quantified skills. See, *e.g.*, *Parson* v. *Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1385-1386 (5th Cir. 1978), cert. denied, 441 U.S. 968 (1979); *Rowe* v. *General Motors Corp.*, 457 F.2d

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[12] The American Psychological Association (APA) reaches a similar conclusion in its brief amicus curiae in this case. See Br. 5 (citation omitted) ("Most simply, '[m]easures that require the statement of opinion, beliefs, or judgments are considered subjective.' ").

348, 359 (5th Cir. 1972). Moreover, this Court's decisions in "pattern and practice" disparate treatment cases make clear that statistically significant disparities may be used in appropriate circumstances to infer discriminatory intent.[13] And, following these "pattern and practice" decisions, the courts of appeals have consistently held that unwarranted recourse to subjective selection processes can provide the missing link between statistical disparities and illegal discrimination. See, *e.g.*, *Bauer* v. *Bailar*, 647 F.2d 1037, 1045 (10th Cir. 1981); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 450-451 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977). Thus, both theory and practice confirm that disparate treatment theory is an effective tool for ferreting out discriminatory subjective decisionmaking.

2. Petitioner, however, suggests (Br. 24-25, 35, 41-44), as did the Ninth Circuit in *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477 (1987) (en banc), that subjective selection processes may conceal discriminatory intent too difficult to establish because these processes often reflect routine adherence to past decisions whose original purposes are undiscoverable. But this suggestion is unwarranted. A plaintiff may properly urge an inference of discriminatory intent on the basis of objective factors, such as the race or sex of the individual making the selection decisions, the absence of controls to ensure that nondiscriminatory decisions result, or an inevitable or foreseeable adverse impact of a subjective selection process. *Personnel*

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[13] As the Court said in *Teamsters*, 431 U.S. at 339-340 n.20 (emphasis added):

> *Statistics showing racial or ethnic imbalance are probative in a case such as this one [involving subjective hiring practices] only because such imbalance is often a telltale sign of purposeful discrimination*: absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. *Evidence of a longstanding and gross disparity between the composition of a work force and the general population thus may be significant even though [Section] 703 (j) makes clear that Title VII imposes no requirement that a work force mirror the general population.*

See also *Hazelwood Sch. Dist.*, 433 U.S. at 307-308; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

Adm'r v. *Feeney*, 442 U.S. 256, 279 n.25 (1979); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Teamsters*, 431 U.S. at 336-339. Importantly, as noted above, the fact that an employer cannot provide a job or business-related reason for using a particular subjective selection process may also constitute evidence of discriminatory intent. Thus, an employer plainly cannot expect to rebut a prima facie statistical showing of discriminatory treatment with an apology that such consequences are merely the result of a longstanding practice with an unknowable purpose. Rather, as a practical matter, the employer must show that its recourse to, and its particular applications of, the selection process are reasonably related to the requirements of the job or other business need. Accord, B. Schlei & P. Grossman, *supra*, at 1287-1288; Denis, *supra*, 11 Empl. Rel. L.J. at 270-276.

Nor is there merit to the concern voiced by petitioner (Br. 36-41) and the Eleventh Circuit (see *Griffin* v. *Carlin*, 755 F.2d 1516, 1525 (1985)) that the disparate impact theory must be extended to subjective selection processes in order to prevent employers from abandoning unvalidated objective selection practices and substituting subjective selection processes in their place. This extension simply turns *Griggs* on its head. The very purpose of the *Griggs* decision was to require employers to *abandon* unvalidated objective selection practices (where those practices had a disparate impact on a protected group). Moreover, *Griggs* and its progeny in this Court make clear that Title VII leaves employers with the choice of adopting validated objective selection devices or considering each employee or applicant individually.[14] And, in any event, there are a host of pressures that keep employers from unwarranted and pretextual recourse to subjective selection processes: objective selection devices in many circumstances are the only efficient means of selection and the pressures of competitive markets will compel

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[14] See *Griggs*, 401 U.S. at 431-433; *Furnco Constr. Corp.* v. *Waters*, 438 U.S. at 578. Accord, Larson § 76.33, at 15-86 to 15-87 ("The duty imposed by Title VII is a duty to refrain from racial discrimination in employment. If an employer can manage to comply with the duty without the aid of formally devised and implemented objective criteria, he cannot be held to have violated the Act.").

their adoption; unions typically attempt to reduce managerial discretion by demanding that employers, especially public employers, adopt objective selection devices; and, as explained above, employers have a strong incentive to be on guard against statistical disparities that may form the basis of expensive disparate treatment litigation.[15]

3. In this case, of course, petitioner also made a disparate *treatment* claim of just the sort that we have described. In support of this claim, she introduced evidence concerning her own attempts to obtain promotions, the identity of the persons who denied her those promotions, the subjectivity of respondent's selection process, and statistics purporting to show that the bank had engaged in a pattern and practice of racially discriminatory decisionmaking. In response, respondent explained why petitioner was denied promotions, described the origin, purpose, and operation of its subjective selection process, noted the inadequacy of petitioner's sample size, and introduced evidence to undermine any adverse inferences that might arise from petitioner's statistical proof. Based on its evaluation of the entire record, the district court found that respondent had legitimate nondiscriminatory reasons for not promoting petitioner, a finding that was affirmed on appeal (with one judge dissenting), and that this Court has not chosen to review. Cf. *Goodman* v. *Lukens Steel Co.*, No. 85-1626 (June 19, 1987), slip op. 7-8. That petitioner failed to prevail on her disparate treatment claim does not show that disparate treatment analysis is an inadequate response to discriminatory subjective decisionmaking; it shows rather that petitioner failed to convince the courts below that she was a victim either of individual discriminatory actions or of a pattern and practice of discriminatory subjective decisionmaking. Therefore, Title

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[15] Petitioner cites selective sources in suggesting (Br. 38, 41) that there has been a decline in the use of objective selection devices. Other sources contend that recent empirical data show that use of objective selection practices is on the rise. See, e.g., Haney, *Employment Tests and Employment Discrimination: A Dissenting Psychological Opinion*, 5 Empl. Rel. L. J. 1, 2 n.4 (1982).

VII's policy against employment discrimination has been appropriately served in this case.[16]

C. Extending Disparate Impact Analysis to the Decisions Resulting from Subjective Selection Processes Would Upset Congress's Delicate Balance of Competing Concerns in Title VII

Disparate impact theory should not be extended to subjective selection processes. To do so would undermine other important policies that Congress embodied in Title VII.

1. In cases involving statistical disparities, the principal difference between disparate treatment and disparate impact analysis is the showing that a defendant must make in order to rebut a prima facie case of discrimination.[17] In a disparate treatment case based on statistical evidence, the defendant must provide evidence of the "legitimate, nondiscriminatory" reasons it had for the actions it took and in that way refute the inference that an improper discriminatory motive was at work. See *Bazemore* v. *Friday*, slip op. 10-13. By contrast, in a disparate impact case, the defendant must make the more rigorous initial showing that the selection device producing the statistical disparity has a "manifest relationship" to successful job performance or to the safe and efficient operation of its business. See *Griggs*, 401 U.S. at 432. As a practical matter, a defendant

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[16] Petitioner and the APA argue (Pet. Br. 45-49; APA Br. 22-27) that respondent's subjective selection process is defective in several respects and that respondent had no legitimate reason for failing to correct those infirmities (especially given the alleged racial disparity in its workforce). But petitioner did not present this evidence to the district court. Thus, if the result below is incorrect, the fault is not properly corrected in this Court and certainly does not inhere in the legal theories available to petitioner.

[17] There are prima facie and defense components to both disparate treatment and disparate impact analyses. See *Aikens*, 460 U.S. at 711 n.1. Where a plaintiff relies exclusively on statistical evidence, however, courts generally test the sufficiency of the prima facie showing by the same behavioral research norms, regardless of the legal theory being employed. See B. Schlei & P. Grossman, *supra*, at 98-99, 1287-1288, 1370-1375.

could rarely, if ever, actually validate or otherwise formally substantiate its subjective judgments or processes.

Where a showing of "manifest relationship" is required, the Court has said that "it is an insufficient response to demonstrate some rational basis for the challenged practices" (*Washington* v. *Davis*, 426 U.S. 229, 247 (1976)). Rather, the Court has said, an employer must show that the device challenged is "demonstrably a reasonable measure of job performance" (*Griggs*, 401 U.S. at 436), or that it otherwise "significantly serve[s]" legitimate business needs (*New York Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 & n.31 (1979)). To do this, an employer ordinarily must (a) define the skills, abilities, or traits required for successful job performance, (b) collect or point to reliable data showing that its selection process measures those qualities, and (c) demonstrate by an appropriate "validation strategy"[18] or other means of formal substantiation[19] that the selection process has a sufficient connection with effective job performance or efficient

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[18] By "validation strategy," we refer to the three basic methods that the industrial psychology profession has developed for establishing the psychometric soundness of a selection device: "content" validity, "empirical" or "criterion-related" validity, and "construct" validity. See *Albemarle Paper Co.*, 422 U.S. at 431; *Washington* v. *Davis*, 426 U.S. at 247 n.13.

[19] This Court has indicated that the necessary "manifest relationship" to job performance or business need may, in appropriate circumstances, be established by means other than by a formal validation strategy. See, *e.g.*, *Washington* v. *Davis*, 426 U.S. at 427 n.13; *Beazer*, 440 U.S. at 587 n.31; *United States* v. *South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), aff'd mem. *sub nom. National Education Ass'n* v. *South Carolina*, 434 U.S. 1026 (1978). Decisions of the courts of appeals reflect this judgment. See, *e.g.*, *Davis* v. *City of Dallas*, 777 F.2d 205, 217-218 (5th Cir. 1985), cert. denied, No. 85-1533 (May 19, 1986); *Aguilera* v. *Cook Cty. Police & Corrections Merit Bd.*, 760 F.2d 844, 847-848 (7th Cir.), cert. denied, 474 U.S. 907 (1985). In this regard, some cases indicate that, in appropriate circumstances, an employer may establish the necessary "manifest relationship" by merely articulating a facially reasonable job requirement. See, *e.g.*, *Yuhas* v. *Libbey-Owens-Ford Co.*, 562 F.2d 496, 498-500 (7th Cir. 1977), cert. denied, 435 U.S. 934 (1978); *Smith* v. *Olin Chemical Corp.*, 555 F.2d 1283, 1287-1288 (5th Cir. 1977) (en banc). The correctness of these decisions, which have some commonsense appeal, will ultimately have to be evaluated in light of this Court's various descriptions of the "manifest relationship" requirement. Compare *Albemarle Paper Co.*, 422 U.S. at 425-436, with *Beazer*, 440 U.S. at 587 n.31. But in almost no circumstance could an employer show that its subjective judgment

business operation. See *Washington* v. *Davis*, 426 U.S. at 246-252; *Albemarle Paper Co.*, 422 U.S. at 425-436. Though this process of job definition, data collection, and formal substantiation can be quite costly and time-consuming,[20] certain objective selection devices – such as reading ability tests and verbal skill requirements – have been shown to have the necessary "manifest relationship" to performance of particular jobs (especially those involving a small number of simple and repetitive tasks).[21]

By stark contrast, we have been unable to find a single reported case in which a subjective selection process was successfully substantiated by formal means.[22] The problem is that subjective selection processes are typically used to assess

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has a "manifest relationship" to the job by any means other than reasonable inference. Therefore, inferential reasonableness is all that can be required of selection practices that rely on the employer's subjective judgment.

[20] For discussions of the costs and complexities attendant to such efforts, see A. Outerbridge, Personnel Res. and Dev. Ctr., OPM, *TM-73-18, A Survey of Test Validation Study Costs* at 1 (Aug. 1979) (costs of studies surveyed ranged from $24,000 for measurement of a single characteristic to $1,245,00 for measurement of multiple characteristics); Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6 (adequate validation study costs between $100,000 and $400,000); Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII, An Economist's View*, 54 Notre Dame Law. 633, 643 (1979) (cost of measuring one simple characteristic ranges from $20,000 to $100,000).

[21] See Comment, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 Emory L.J. 203 (1987) (summarizing developments); Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 Emory L.J. 121 (1980) (same).

[22] Professor Blumrosen surveys the cases and reaches the same conclusion. See Blumrosen, *The Legacy of* Griggs: *Social Progress and Subjective Judgments*, 63 Chi.-Kent L. Rev. 1, 22, 33-37 (1987). The NAACP Legal Defense and Education Fund, et al., errs in suggesting (Amicus Br. 29-30) that a subjective selection process was successfully validated in *Harrison* v. *Lewis*, 559 F. Supp. 943 (D.D.C. 1983). The employer in *Harrison* did produce a "replication study" of its selection procedures, but the court held that the study did "not in fact demonstrate the validity of [one] selection procedures * * *" (*id.* at 948).

Occasionally, courts have upheld subjective decisionmaking processes against disparate impact attacks, but only by judging the facial reasonableness

intangible qualities—*e.g.*, alertness, common sense, compatibility with others on a staff, drive, ethical sensitivity, judgment, originality, and how a candidate will react to unpredictable conditions. While there is considerable agreement about the necessity of these qualities for effective performance of many jobs, there is much less agreement about how to detect these qualities in candidates for hiring or promotion. Nor is there consensus about what constitutes effective job performance for business managers, doctors, industrial engineers, judges, law clerks, research scientists, or, indeed, any person who performs a job that involves complex tasks or requires the exercise of judgment. Moreover, there is no generally recognized means of scoring potential candidates to such jobs: Subjective impressions converted to numbers are still subjective judgments that vary among individuals and over time. There is no agreed-upon control group of successful job performers against which the results of the subjective selection process may be compared. And, where work takes place on a team or faculty level, there is added difficulty in attempting to isolate and define individual effective job performance. Accordingly, commentators in the legal, industrial psychology, and personnel administration professions have almost uniformly stated that subjective selection processes do not have the "technical reliability"[23]

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of the processes (and by holding that formal substantiation of a "manifest relationship" is unnecessary). See, *e.g.*, *Zahorik* v. *Cornell*, 729 F.2d 85, 96 (2d Cir. 1984) (academic tenure decision process). These decisions, in our view, properly collapse disparate impact analysis into disparate treatment analysis with respect to subjective selection systems. The Lawyer's Committee for Civil Rights Under Law agrees, although it fails to face up to its own admission. See Amicus Br. 23-24 ("This Court has never held * * * that formal validation is the only defense to a showing that an employment practice has an adverse impact. * * * [A]n employer may be able to sustain a subjective employment practice with adverse impact that cannot feasibly be validated if, for example, the employer offers evidence to show * * * that subjectivity is not being used to mask intentional or unintentional discrimination.").

[23] By "technical reliability" we mean the measurement of the extent to which the quantitative description of the amount of some trait an individual possesses or manifests remains constant when that trait is evaluated a number of times or by a number of people. See E. Ghiselli, *Theory of Psychological Measurement* 208 (1964). High "technical reliability" is a necessary but not

that is a necessary precondition of validation or other formal substantiation method.[24]

In suggesting that Title VII should be read to require that subjective selection processes be validated or otherwise formally substantiated, petitioner and her amici, especially the American Psychology Association (APA), gloss over this problem of "technical reliability"[23] and, indeed, take a position that is flatly inconsistent with both the APA's own professional principles and prior representations that the APA's members have made to-

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sufficient condition for "technical validity." See W. Cascio, *Applied Psychology In Personnel Management* 147-148 (2d ed. 1982).

[24] For a sampling of the commentary, see, e.g., *McDonnell Douglas Corp.*, 441 U.S. at 806 n.21; *Guardians Ass'n* v. *Civil Service Comm'n*, 630 F.2d 79, 92 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); M. Miner & J. Miner, *Employee Selection Within the Law* 145-165, 338 (1979); Blumrosen, *supra*, 63 Chi.-Kent L. Rev. at 18, 30-33, 37; Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 987-988, 1026-1027 (1982); Hunt & Pazuniak, *Special Problems in Litigating Upper Level Employment Discrimination Cases*, 4 Del. J. Corp. L. 114, 128-134 (1978); Gwartney, Asher, Haworth & Haworth, *supra*, 54 Notre Dame Law. at 641-643; Lerner, Washington *v.* Davis: *Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 286-289, 299-300; Larson, § 76.34, at 15-87 to 15-95; Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 580-582 (1986).

[23] More specifically, they engage in a strategy of confession and avoidance with respect to this "technical reliability" point. For example, the APA admits (Br. 9) that the psychometric soundness of a selection device depends on its "technical reliability" as well as on its "validity." But rather than concede that technical unreliability makes formal substantiation of subjective selection processes impossible, the APA skips over the issue (*ibid.*); it suggests instead (Br. 14-21) that, with sufficient resources and time, psychometricians frequently can restructure, quantify, and otherwise objectify subjective selection processes in ways that, under laboratory conditions, allow them to be validated in ways similar to which objective selection processes are validated. But this response begs the question. It is of course true that, by converting subjective processes into largely objective ones, validation theories applicable to objective processes may be applied to processes that were formerly entirely subjective. But the question here is whether subjective judgments may themselves be formally validated or substantiated. As noted above, on this point the commentators agree that subjective selection processes cannot be so substantiated.

this Court.[26] Moreover, they fail to appreciate that a selection process may contribute significantly to productivity or other business-related needs even though it is unreliable by the "technical criteria" of the psychology profession (and accordingly cannot be validated or otherwise substantiated). There simply is no scientific way of measuring how good subjective judgments are.[27] Yet it is extreme and unwarranted to insist that

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[26] By their own terms, the *Principles for the Validation and Use of Personnel Selection Procedures* 2 (3d ed. 1987), upon which the APA relies in its brief, do no more than "present ideals toward which the members of this Society and other researchers and practitioners are expected to strive." Moreover, they warn that "the importance of adherence to the *Principles* depends on the consequences of error which may result in physical, psychological, or economic injury to people or reduce the safety or operating efficiency of the organization" and therefore that they are "*not* written as law" (*id.* at 2, 3 (emphasis in original)). In that spirit, Division 14 of the APA advised this Court in 1975 that, notwithstanding over one hundred years of research, "the technology of psychological testing and other employee selection procedures remains relatively embryonic" and that "*it is manifestly inappropriate for this profession to impose its ideals upon employers charged with meeting legal requirements while maintaining a profitable business*" (APA Amicus Br. 9, 28 (emphasis added)), in *Washington* v. *Davis*, *supra*). Indeed, Division 14 of the APA complained that the EEOC and the lower federal courts had "*tended to impose an increasing number of professionally unrealistic and effectively unattainable requirements as the bare minimums acceptable * * * in establishing whether tests and other selection procedures are demonstrably job-related*" (*id.* at 20 (emphasis added)). Accordingly, it is not easy for us to understand on what basis the APA now suggests (Br. 2-4, 6-9, 28-30) that Title VII should be interpreted as requiring employers to validate their selection processes – subjective or objective – under the strict standards set forth in the *Principles*. In any event, the APA fundamentally misunderstands the prohibitions of Title VII: Congress prohibited discrimination in employment decisions; it did not prohibit "wrong" decisions or "errors" (APA Br. 16-17).

[27] The APA errs in suggesting (Br. 14-21) that employers can establish content or criterion-related validity by training decisionmakers and objectifying interviews and performance appraisals. While standardized interview questions may be content valid, neither the responses given by candidates nor the interviewers' subjective judgments concerning the completeness or style of the response can be validated for content. See Larson § 76.33, at 15-85 to 15-87. Likewise, criterion-related validation is impossible; no matter how many past selections a decisionmaker has made, one cannot readily predict the outcome of an equal number of his future subjective decisions. See *ibid.* Thus, the APA apparently concedes (Br. 25) that creation of subjective "constructs" may be

such judgment therefore be rigidly eschewed. "In the aggregate, heightened probabilities for excellence are not a function of the validity of any particular selection device," but "are the result of a total situation in which vast numbers of employers are free to experiment with an unlimited number of possible qualitative requirements, discarding those that seem unsatisfactory and replacing them with others that seem more promising, and so on and on, in a continuing, open-ended process" (Lerner, *supra*, 1976 Sup. Ct. Rev. at 304-305).[28]

2. Ruling that the disparate impact theory is applicable to decisions resulting from subjective selection processes would, therefore, create an irresistible incentive for employers to abandon subjective selection processes in favor of objective ones or, where such replacement is too difficult or expensive, to eliminate the statistical disparity by superimposing quotas upon them.[29] Neither result would be consistent with the intent of the 1964 Congress.[30]

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necessary to validate these objectified decision processes. But, as several courts have noted, "construct validation" builds on content and criterion validation and, accordingly, cannot practicably be conducted where content and criterion validation are infeasible. See, *e.g.*, *Guardians Ass'n* v. *Civil Service Comm'n*, 630 F.2d at 92; *Douglas* v. *Hampton*, 512 F.2d 976, 985 (D.C. Cir. 1975).

[28] Accord, M. Miner & J. Miner, *supra*, at 143; Blumrosen, *supra*, 63 Chi.-Kent L. Rev. at 18; Maltz, *Title VII and Upper Level Employment – A Response to Professor Bartholet*, 77 Nw. U. L. Rev. 776, 789 (1983); Hunt & Pazuniak, *supra*, 4 Del. J. Corp. L. at 133; Lerner, *supra*, 1979 Sup. Ct. Rev. at 23; Gwartney, Asher, Haworth & Haworth, *supra*, 54 Notre Dame Law., at 642 n.20.

[29] Even petitioner's most vocal supporters disagree with her assertion (Br. 39-41, 44-49) that employers would not be forced down one of these two roads. See, *e.g.*, Bartholet, *supra*, 95 Harv. L. Rev. at 1026-1027 ("Another result might be increased pressure for quota or racially proportionate hiring among those satisfying certain minimum qualifications[,] * * * [f]or it will probably be difficult to demonstrate the job-relatedness and business necessity of many of these selection systems, in large part because it is difficult to determine what good performance is and how to measure it. * * * Selection on a racially proportionate basis seems an appropriate solution."); Blumrosen, *supra*, 63 Chi.-Kent L. Rev. at 17, 35-36 (same).

[30] Petitioner errs in suggesting (Br. 26-29) that the intent of the 1972 Congress is relevant here. In 1972, Congress did not amend the language of Section 703(a)(1) and (2) in any pertinent respect. See Equal Employment

As this Court has noted, "Title VII would not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business" (*Steelworkers* v. *Weber*, 443 U.S. 193, 206 (1979)). See also *Firefighters* v. *Cleveland*, No. 84-1999 (July 2, 1986), slip op. 16-18; *Sheet Metal Workers* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 27-39. These legislators' resistance arose from their belief that "[a]ny attempt to prescribe the qualifications that employers may or may not use in job selection necessarily conflicts with a value that is deeply held by members of a broad spectrum of American society—the value of employer autonomy" (Maltz, *supra*, 77 Nw. U. L. Rev. at 789).[31] These "legislators demanded as a price for their support [a concession] that 'management prerogatives, and union freedoms [would] be left undisturbed to the greatest extent possible' " (*Weber*, 403 U.S. at 206 (citation omitted)). Thus,

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Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. Thus, it is the intent of the 1964 Congress that controls the interpretation of these provisions. See *Teamsters*, 431 U.S. at 354 n.39.

In any event, the legislative history of the 1972 amendments does not support petitioner's thesis that Congress extended *Griggs* to subjective selection processes. While the floor debate and committee reports reflect a congressional concern with "systemic" or "institutional" discrimination in the public and private sectors, those concerns were expressed during a debate about the appropriate scope of the EEOC's enforcement authority and of Title VII itself (in terms of the employers that it covered). See, *e.g.*, S. Rep. 92-415, 92d Cong., 1st Sess. 4-5 (1972); H.R. Rep. 92-238, 92d Cong., 1st Sess. 21-22 (1972); 118 Cong. Rec. 1815-1816 (1972) (remarks of Sen. Williams); 117 Cong. Rec. 31960 (1972) (remarks of Rep. Perkins). Congress concluded this discussion by conferring broad litigating authority upon the EEOC, including the authority to bring "pattern or practice" suits in federal court, and by extending the coverage of Title VII to cover public employers, including the federal government. See *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 325-329 (1980) (reviewing legislative history). Thus, while petitioner has correctly identified a problem that concerned the 1972 Congress, she fails to appreciate that Congress resolved that problem without "transform[ing] the substantive standard governing employer conduct." *Johnson* v. *Transp. Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 9 n.6.

[31] See, *e.g.*, 110 Cong. Rec. 15893 (1964) (remarks of Sen. McCulloch); *id.* at 14314 (remarks of Sen. Miller); *id.* at 13078 (remarks of Sen. Cooper); *id.* at 9601 (remarks of Sen. Fulbright); *id.* at 8500 (remarks of Sen. Allott); *id.* at 8442 (remarks of Sen. Hill); *id.* at 6562 (remarks of Sen. Kuchel).

even assuming that objective selection criteria exist or can reasonably be derived for all job categories,[12] employers cannot be required to replace their subjective selection processes with those objective criteria; to do so would create the very bureaucratization and regimentation of the employee selection process that the key legislators would not accept.

Moreover, given the generally prohibitive cost of converting subjective selection processes to validated objective ones, the more likely response of employers would be to superimpose numerical quotas on their subjective selection processes. This Court, of course, has held that Title VII *permits* employers to engage in limited forms of voluntary affirmative action. See *Johnson* v. *Transp. Agency, supra.* But the Court has also firmly asserted that Section 703(j)[13] was added to Title VII to assure that the statute would not be interpreted to "require employers or labor unions to use racial quotas or to grant preferential treatment to * * * avoid being charged with unlawful discrimination" (*Sheet Metal Workers*, slip op. 27). The congressional record is replete with comments "that employers would not be *required* to institute preferential quotas to avoid Title VII liability" (*Weber*, 443 U.S. at 207 n.7 (emphasis in original)). Thus, a rule of law that would "leav[e] * * * employer[s] [with] little choice * * * but to engage in * * * subjective quota system[s] of employment" would be "far from the intent of Title VII" (*Albemarle Paper Co.*, 422 U.S. at 449 (Blackmun, J., concurring in the judgment)).

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[12] Of course, this is an unrealistic assumption. For many employment decisions, especially those involving professional or managerial positions, a complete and sufficient range of such objective criteria does not exist. See *Rogers* v. *Int'l Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), vacated on other grounds, 423 U.S. 809 (1975); *Gottlieb* v. *Tulane Univ. of Louisiana*, 809 F.2d 278, 283 & n.6 (5th Cir. 1987); Lerner, *supra*, 1979 Sup. Ct. Rev. at 23.

[13] Section 703(j) provides that "[n]othing contained in this subchapter shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race * * * employed by any employer * * * in comparison with the total number or percentage of persons of such race * * * in any * * * area, or in the available work force in any * * * area" (42 U.S.C. 2000e-2(j)).

D. The Uniform Guidelines On Employee Selection Procedures do not Provide That Subjective Selection Processes Must Be Validated

Petitioner also contends (Br. 24, 31-32) that the Court should defer to the Uniform Guidelines on Employee Selection Procedures (1978), 29 C.F.R. Pt. 1607, which she reads as requiring the validation of subjective selection procedures. But petitioner advocates a reading of the Guidelines with which the United States and the EEOC strongly disagree.[34]

1. The Guidelines provide that the "use of any selection procedures which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered * * * discriminatory * * * *unless* the procedure has been validated * * * *or* the provisions of Section 6 [of the Guidelines] * * * are satisfied" (29 C.F.R. 1607.3A (emphasis added)). A "selection procedure" is defined to include "[a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q). Section 6 of the

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[34] Petitioner errs in suggesting (Br. 20-21, 30-34) that the EEOC has consistently interpreted Title VII as requiring subjective selection procedures with adverse impacts to be validated or otherwise formally substantiated. The EEOC first took notice in 1966 that intelligence and cognitive tests might inadvertently exclude qualified minority applicants and, at that time, issued guidelines advocating that employers refrain from using "tests" that were not job-related. See EEOC, *Guidelines on Employment Testing Procedures* (Aug. 24, 1966). But those guidelines were directed exclusively to the meaning of the phrase "professionally developed ability test[s]" in Section 703(h) of the statute (42 U.S.C. 2000e-2(h)); they were *not* addressed to other kinds of selection devices, objective or subjective. In 1970, the EEOC formally expanded its guidelines to encompass all varieties of selection procedure, including subjective selection procedures, and provided that any procedure with an adverse impact must be validated or otherwise formally substantiated. See Guidelines on Employee Selection Procedures 1607.2, 1607.13, 35 Fed. Reg. 12333, 12334 (1970). In 1978, however, when the EEOC became signatory to the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, Section 6 of the Uniform Guidelines was substituted in place of the provision of the 1970 Guidelines which required formal substantiation of subjective selection procedures. See pages 26-28, *infra*.

Guidelines goes on to state, however, that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines," that such "circumstances" include the use of "informal or unscored selection procedure[s]," and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (29 C.F.R. 1607.6B). Unfortunately, the Guidelines do not clarify how a user "justif[ies] continued use of the procedure[s] in accord with Federal law."[35] And to the extent that additional explanation concerning what the Guidelines require in such situations has been offered, the signals have been mixed.[36]

2. In the view of the United States and the EEOC, as a practical matter, an employer "justif[ies] continued use of the procedure in accord with Federal law," within the meaning of Section 6B (29 C.F.R. 1607.6B), by showing that the selection procedure is reasonably related to the requirements of the job or other business needs and has been applied in a nonpretextual fashion, as the employer would do in any disparate treatment case (and as the courts below held that respondent did in this case). Where an employer chooses to rely on the predictive value of an objective selection device, it is reasonable to require that employer to justify its reliance under the disparate impact theory. But where an employer chooses to use subjective selec-

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[35] Commentators on both sides of the debate have agreed with our characterization of the Guidelines. See Bartholet, *supra*, 95 Harv. L. Rev. at 983, 988 n.141; Larson, § 76.333, at 15-86 to 15-87.

[36] When the Guidelines were first promulgated, the prefatory comments stated that "[a] few practices may be used without validation even if they have an adverse impact. See, *e.g.*, *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and section 6B." 43 Fed. Reg. 38291 n.17 (1978). Six months later, in response to a question concerning how users can "justify continued use of a procedure on a basis other than validity," the agencies said, "The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B." 44 Fed. Reg. 12002 (1979). The response added that, "[i]n *Griggs*[,] * * * the Supreme Court indicated that the burden on the user was a heavy one," that "the selection procedure could be used if there was a 'business necessity' for its continued use," and that "the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of selection procedure" (*ibid.*).

tion procedures, it is unreasonable to require it to demonstrate a "manifest relationship" between the subjective process and successful job performance, for there is no practical way to do so; the employer can only show that its subjective judgments are inferentially reasonable. To require the employer to do more would simply cause it to replace its subjective selection processes with objective ones or, more likely, to superimpose quotas on its subjective systems of employment. The 1964 Congress took a clear stand that the government is precluded from creating a regulatory regime that impels employers toward either result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

GLEN D. NAGER
Assistant to the Solicitor General

DAVID K. FLYNN
ROBERT J. DELAHUNTY
Attorneys

CHARLES A. SHANOR
General Counsel
Equal Employment
Opportunity Commission

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No. 86-6139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen
NORMAN REDLICH
Trustee

WILLIAM L. ROBINSON
JUDITH A. WINSTON
RICHARD T. SEYMOUR

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 "Eye" Street, N.W.
Washington, D.C. 20005
(202) 371-1212

JOHN TOWNSEND RICH *
ELIZABETH RUNYAN GEISE
NANCY B. STONE

SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Amicus Curiae
Lawyers' Committee for Civil Rights
Under Law

* Counsel of Record

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law submits this brief as *amicus curiae*, urging reversal.[1]

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to insure civil rights to all Americans. It has represented and assisted other lawyers in representing numerous individuals in administrative proceedings and lawsuits under

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[1] Pursuant to Rule 36.2, the Lawyers' Committee has filed written consents of the parties to the submission of this brief as *amicus curiae*.

Title VII. *E.g.*, *Lewis* v. *Bloomsburg Mills, Inc.*, 773 F.2d 561 (4th Cir. 1985); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978). The Lawyers' Committee has also represented parties and participated as an *amicus* in Title VII cases before this Court. *E.g.*, *Chandler* v. *Roudebush*, 425 U.S. 840 (1976); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977).

The question presented by this case—whether disparate impact analysis may be applied to employment practices involving subjective decisionmaking—is an important and recurring issue of Title VII law. This Court's decision will undoubtedly have significant implications for present and future Title VII suits in which the Lawyers' Committee participates. In addition, the Lawyers' Committee's experience in Title VII litigation may enable it to illuminate some of the issues presented by this case for this Court.

SUMMARY OF ARGUMENT

The issue before this Court is a narrow one: whether the court of appeals was correct to preclude disparate impact analysis of the respondent bank's promotion practices on the grounds that such practices were "discretionary," *i.e.*, involving subjective decisionmaking. Contrary to the position of *amicus* United States, this issue is not controlled by this Court's prior decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Teamsters* v. *United States*, 431 U.S. 324 (1977), *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977), and *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). While this Court declined to apply disparate impact analysis in each of those cases, it did so either because the only claims at issue were of intentional discrimination or because the evidence presented did not support a disparate impact claim. Thus, this case presents an issue not yet considered by this Court.

On the merits, the language of Title VII and the case law thereunder, the administrative regulations, and the legislative history of the 1972 amendments all demonstrate that no exemption from disparate impact analysis for subjective employment practices is warranted. Furthermore, the differences between a disparate treatment and disparate impact challenge to a subjective employment practice—which we explain in detail—show that to confine such challenges to disparate treatment analysis would defeat a central purpose of Title VII, *i.e.*, to get rid of employment practices with an adverse impact on suspect groups that are not justified as "job-related" or by "business necessity", whatever the motivation behind the practices. Finally, contrary to the contention of *amicus* United States, allowing disparate impact challenges to subjective practices will not leave an employer without a defense to a disparate impact showing. A "business necessity" or "job-related" defense would still be possible, and certain subjective practices may be capable of validation.

ARGUMENT

I. The Issue Presented by This Case Is Not Controlled by the Prior Opinions of This Court in *McDonnell Douglas*, *Teamsters*, *Hazelwood*, or *Furnco*.

The evidence below established that respondent bank's practice was to allow promotion decisions to rest in the discretion of "a limited group of white department supervisors." Pet. App. 7a. The court of appeals held that the petitioner could not attempt to show that such a promotion policy was unlawfully discriminatory under disparate impact analysis because the promotion policy was "discretionary." Pet. App. 8a. In *Connecticut* v. *Teal*, 457 U.S. 440, 445-446, 448 (1982), this Court noted that disparate impact analysis, first outlined in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), is based on

Section 703(a)(2) of Title VII,[2] and that *Griggs* and its progeny stand for the proposition that an employment practice which has a disparate impact on a suspect group and is not shown to be related to job performance is illegal, whether or not the employer had an "invidious intent" in adopting such a practice. *Id.* at 446. Disparate treatment analysis, by contrast, seeks to outlaw intentional discrimination in employment, on either an individual or class-wide basis. *Teamsters* v. *United States*, 431 U.S. 324, 335-36 & n.15 (1977). This Court has emphasized that a given employment practice may be attacked under both disparate impact and disparate treatment theories. *Id.* at 336 n.15. Thus, the issue before this Court is whether the Fifth Circuit correctly precluded the plaintiff from proceeding under disparate impact theory on the grounds that the employment practice she challenged was "discretionary."

In its *amicus* brief on petition for writ of certiorari, the United States suggested that this Court has already decided this issue in four prior decisions, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *Teamsters* v. *United States*, 431 U.S. 324 (1977), *Hazelwood School Dist.* v. *United States*, 433 U.S. 299 (1977), and *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). According to the United States, all four cases involved attacks on "subjective selection devices," and, in each case, this Court "declined to extend the disparate

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[2] Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1982), provides in the pertinent part as follows:

> "It shall be an unlawful employment practice for an employer—
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

impact doctrine * * * [and] instead * * * required Title VII plaintiffs to prove discriminatory motivation." Brief for the United States as *Amicus Curiae* in Support of Petition for Writ of Certiorari, at 11 (May 1987) (hereinafter "U.S. Cert. Brief"). Contrary to the United States' position, however, examination of those four cases reveals that none decided the precise issue presented here.

In three of the four cases cited by the United States in its brief on certiorari, *McDonnell Douglas*, *Teamsters*, and *Hazelwood*, the only claims presented were of intentional racial discrimination; no claims of disparate impact under § 703(a)(2) of Title VII were made. Thus, in *McDonnell Douglas*, plaintiff's claim was that the employer defendant "had refused to rehire him because of his race and persistent involvement in the civil rights movement, in violation of §§ 703(a)(1) and 704(a) [of Title VII]." 411 U.S. at 796. Similarly, *Teamsters* and *Hazelwood* both involved claims that the employer had engaged in a "pattern or practice" of intentional discrimination. See *Teamsters*, *supra*, 431 U.S. at 335 ("The Government's theory of discrimination was simply that the company, in violation of § 703(a) of Title VII, regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons."); *Hazelwood*, *supra*, 433 U.S. at 307 n.11 (as in *Teamsters*, the government's claim was that the employer " 'regularly and purposefully treated Negroes . . . less favorably than white persons' "). Thus, given that the only claim asserted in each of the three cases was intentional discrimination, each was properly analyzed under disparate treatment theory, and disparate impact analysis was not implicated.

The United States cites language from *McDonnell Douglas* where this Court drew a distinction between the plaintiff's claim of a discriminatory refusal to rehire him, and an exclusion from employment, as in *Griggs*,

"on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior * * *." U.S. Cert. Brief at 12, citing 411 U.S. at 806. But the point of this distinction was not, as the U.S. suggests, to draw a line between "objective" employment practices, to which a *Griggs* analysis applies, and "subjective" practices, to which *Griggs* is inapplicable. Instead, the Court's point was that the *Griggs* disparate impact analysis is designed to challenge "systemic results of employment practices." *Segar* v. *Smith*, 738 F.2d 1249, 1267 (D.C. Cir. 1984). Thus, because the plaintiff in *McDonnell Douglas* claimed only that he was the victim of an intentionally discriminatory employment decision unique to him, rather than any sort of broader policy or system of the employer, disparate impact analysis did not apply.

In contrast to *McDonnell Douglas*, *Teamsters* and *Hazelwood*, the plaintiffs in *Furnco* sought to proceed under both disparate impact and disparate treatment analysis. 438 U.S. at 569. The case involved the hiring of bricklayers by a superintendent at a construction site. The challenged practice was the superintendent's refusal to accept applications for bricklayer positions at the job site; instead, the superintendent "hired only persons whom he knew to be experienced and competent * * * or persons who had been recommended to him as similarly skilled." 438 U.S. at 570. Although this Court held that the "proper approach" for this claim was the disparate treatment model set forth in *McDonnell Douglas*, 438 U.S. at 575, the reason for this conclusion was not that a "subjective" employment practice was involved. The district court in *Furnco* had held that plaintiffs had not shown that Furnco's policy of not hiring at the gate "had a disproportionate impact or effect on black bricklayers," 438 U.S. at 571, and this finding had not been found to be erroneous by the court of appeals. *Id.* at

570. Thus, when this Court concluded that plaintiffs' claims were properly analyzed under the model set forth in *McDonnell Douglas*, it was simply affirming the district court's and court of appeals' holdings that there was insufficient evidence to make out a disparate impact claim.[3] In these circumstances, this Court did not have to reach the issue presented here, *i.e.*, whether the type of "discretionary" or "subjective" employment practice at issue in *Furnco* could be subject to disparate impact analysis.[4]

In sum, the narrow issue presented by this case—whether disparate impact analysis may be applied to subjective employment practices—has never been decided by this Court. And, as we discuss below, there is no basis for an exception to disparate impact analysis when the employment practice challenged involves subjective decisionmaking.

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[3] *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc) (disparate impact analysis was inapplicable in *Furnco* because plaintiffs "failed to establish a prima facie case of disparate impact"); C. Sullivan, M. Zimmer, R. Richards, *Federal Statutory Law of Employment Discrimination* § 1.6, at 67 (1980) ("better construction" of *Furnco* is that "disparate impact analysis was available but there was no showing of impact").

[4] The United States suggests that, like the plaintiffs in *Furnco*, petitioner's evidence would not make out a prima facie case of disparate impact. See U.S. Cert. Brief at 20 n.16. Nevertheless, petitioner is in a different position before this Court than the plaintiffs in *Furnco*; rather than evaluating her statistical evidence and holding that a prima facie case of disparate impact was not presented, the lower courts in this case simply precluded petitioner from proceeding on a disparate impact basis.

II. Subjective Employment Practices Should Not Be Exempt From Disparate Impact Analysis.

A. The Language of Title VII and Case Law Thereunder, the Administrative Regulations, and the Legislative History of the 1972 Amendments Demonstrate That No Exemption From Disparate Impact Analysis for Subjective Employment Practices Is Warranted.

Examination of the language of Title VII, the relevant case law, the administrative regulations, and the legislative history of the 1972 amendments demonstrates that no exception to disparate impact analysis for employment practices involving subjective decisionmaking is justified.[5]

In *Connecticut* v. *Teal*, *supra*, 457 U.S. at 445-46, 448, this Court held that disparate impact analysis is founded upon Section 703(a)(2) of Title VII. That section prohibits "employment practice[s]" which "limit, segregate, or classify" employees or applicants because of "race, color, religion, sex, or national origin." See p. 4, n.2, *supra*. Thus, as noted in *Teal*, *supra*, 457 U.S. at 448, "[t]he statute speaks * * * in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*." (Emphasis in original.) This language does not suggest an exemption for employment "practices," "limitations," or "classifications" which involve or result from subjective decisionmaking. Further, this Court's decisions have broadly stated that employment "practices" or "procedures" may be subject to disparate impact analysis, without carving out any exception for practices or procedures that involve subjective decisionmaking. *E.g.*, *Griggs*, *supra*, 401 U.S. at 430 (disparate impact analysis reaches employment "practices, procedures, or tests"); *Washington* v. *Davis*,

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[5] For a more detailed analysis of these points, see the brief for *amicus curiae* NAACP Legal Defense and Educational Fund, Inc.

426 U.S. 229, 246-47 (1976) (disparate impact analysis available to challenge "hiring and promotion practices").

The administrative regulations under Title VII also provide support for the point that employment practices involving subjective decisionmaking should not be exempt from disparate impact analysis. Those regulations ("Uniform Guidelines on Employee Selection Procedures") define the selection procedures to which disparate impact analysis may be applied as ranging from the objective "traditional paper and pencil tests" to the clearly subjective "informal or casual interviews and unscored application forms." 29 C.F.R. §§ 1607.3(A), 1607.16(q) (1986). Because these regulations were promulgated by the four federal agencies responsible for enforcing Title VII,[6] this Court has noted that they are entitled to "great deference" as the enforcing agencies' "administrative interpretation of the Act." *Griggs*, *supra*, 401 U.S. at 433-34; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975). See also *Meritor Savings Bank* v. *Vinson*, 106 S. Ct. 2399, 2405 (1986) (while not controlling, EEOC guidelines " 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' ").

The legislative history of the 1972 amendments to Title VII similarly indicates that no exception to disparate impact analysis for employment practices involving subjective decisionmaking is warranted. In *Connecticut* v. *Teal*, *supra*, 457 U.S. at 449, this Court noted that the legislative history to the 1972 amendments showed that Congress intended to remove for state and municipal employees the same sort of "discriminatory barriers" to equal employment opportunity that the

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[6] These agencies are the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice. 29 C.F.R. § 1607.1(A) (1986).

Griggs disparate impact analysis had removed for private sector employees; examples of such "barriers" identified by Congress included "promotions made on the basis of * * * 'discriminatory supervisory ratings.'" *Id.* at 449 n.10. Thus, Congress clearly anticipated that disparate impact theory could be applied to such subjective employment practices. Moreover, the legislative history of the 1972 amendments shows that Congress meant, in areas where a contrary intention was not expressed, to endorse the existing Title VII case law. *Id.* at 447 n.8. And, at the time of the 1972 amendments, courts of appeals had applied disparate impact analysis to employment practices involving subjective decisionmaking. See *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477, 1482-83 (9th Cir. 1987) (en banc) (citing *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 657-58 (2d Cir. 1971)).

In sum, the language of Title VII, the case law, the administrative regulations, and the legislative history of the 1972 amendments all indicate that subjective employment practices should be subject to disparate impact analysis. Moreover, as we show below, creating an exception to disparate impact analysis for subjective employment practices would defeat a central purpose of Title VII.

B. Relegating Plaintiffs Who Challenge Subjective Employment Practices to Disparate Treatment Analysis Would Defeat a Central Purpose of Title VII.

If this Court affirms, plaintiffs challenging subjective employment practices as illegally discriminatory will be confined to disparate treatment analysis. When a plaintiff is challenging one employment decision unique to him, as in *McDonnell Douglas Corp.* v. *Green*, *supra*,[7]

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[7] In *McDonnell Douglas*, the plaintiff challenged the employer's failure to rehire him after his participation in various civil rights

confining that plaintiff to disparate treatment analysis would not make a difference. A case that involves one unique employment decision is not the sort where a disparate impact claim could be made out. But where a plaintiff is challenging a pattern or a series of subjective employment decisions, relegating that plaintiff to disparate treatment analysis would be significant. There are important differences between disparate treatment and disparate impact analysis in that situation. Because of these differences, confining attacks on a pattern or series of subjective employment decisions to disparate treatment analysis would defeat a central purpose of Title VII identified in *Griggs*—to get rid of employment practices with an adverse impact on suspect groups that are not justified by business necessity, whatever the motivation behind the practices.

The aim of disparate treatment analysis is to discover whether there has been intentional discrimination in violation of Title VII. "Proof of discriminatory motive is critical * * *." *Teamsters* v. *United States*, *supra*, 431 U.S. at 335 n.15. Given this ultimate issue, a disparate treatment challenge to a pattern or series of employment practices involving subjective decisionmaking would proceed as follows.[8]

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demonstrations against the employer's allegedly racist hiring policies. The plaintiff did not challenge any broad policy or practice of the employer concerning the rehiring of former employees, just one employment decision affecting him. 411 U.S. at 796.

[8] Disparate treatment challenges to a pattern or series of employment decisions generally proceed as "pattern or practice" actions. In a "pattern or practice" case, the allegation is that the employer "regularly and purposefully" discriminated, *i.e.*, that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Teamsters* v. *United States*, *supra*, 431 U.S. at 335-36; *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 876 (1984). While pattern or practice suits are brought either by the EEOC, pursuant to § 707(d)-(e) of Title VII, 42 U.S.C. § 2000e-6(d) to -(e) (1982), or as private class actions,

As an initial matter, a plaintiff making a disparate treatment claim must present a prima facie case of intentional discrimination, *i.e.*, the "plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII]." *Teamsters*, *supra*, 431 U.S. at 358. In *McDonnell Douglas*, *supra*, 411 U.S. at 802, this Court outlined one formulation of how a plaintiff could go about establishing a prima facie case of intentional discrimination.[9] But this Court has stressed that the *McDonnell Douglas* formulation is not the only means by which a plaintiff may establish a disparate treatment claim. *Teamsters*, *supra*, 431 U.S. at 358 (decision in *McDonnell Douglas* "did not purport to create an inflexible formulation"). In a case where the plaintiff's claim is that a pattern or series of employment decisions are discriminatory, plaintiff's proof will often be statistical in nature.

Cooper v. *Federal Reserve Bank*, *supra*, 467 U.S. at 876 n.9, there is no reason why an individual plaintiff could not make out a case according to the "pattern or practice" order of proof, so long as that plaintiff shows that he was personally affected by the discriminatory policy. *E.g.*, *Davis* v. *Califano*, 613 F.2d 957, 962-66 (D.C. Cir. 1979) (individual plaintiff established a prima facie case of discrimination through elements of a pattern or practice claim set forth in *Teamsters*); *Diaz* v. *American Tel. & Tel.*, 752 F.2d 1356, 1363 (9th Cir. 1985) (statistical evidence of a discriminatory pattern in employer's hiring or promotion practices can "create an inference of discriminatory intent" with respect to employment decision at issue in action brought by individual plaintiff).

[9] Under the *McDonnell Douglas* formulation, a plaintiff may establish a prima facie case of intentional discrimination "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

Statistical proof that an employment practice is discriminatory will generally involve a showing of a statistical disparity between the race or sex of the group selected by the practice, and the race or sex of the group available for the job, such as the general work force, the qualified labor market, or actual applicants. *Hazelwood School Dist.* v. *United States*, *supra*, 433 U.S. at 308 (proper comparison in teacher hiring discrimination case was between racial composition of teaching staff and racial composition of "qualified public school teacher population in the relevant labor market"); *Johnson* v. *Transportation Agency*, 107 S. Ct. 1442, 1452 n.10 (1987) (to make out a prima facie case of hiring discrimination among skilled workers in Kaiser work force, plaintiff "would be required to compare the percentage of black skilled workers in the Kaiser work force with the percentage of black skilled craft workers in the area labor market"). Statistical evidence of such a disparity is "probative" in a case alleging systemic discrimination "because such imbalance is often a telltale sign of purposeful discrimination." *Teamsters*, *supra*, 431 U.S. at 340 n.20. As this Court has noted, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Id.*

Although this Court has never defined exactly what degree of disparity must be shown to make out a prima facie case of intentional discrimination, it noted, in *Hazelwood School Dist.* v. *United States*, *supra*, that if the difference between the expected and observed number of blacks on the Hazelwood teaching staff were greater than two or three standard deviations, "then the hypothesis that teachers were hired without regard to race would be suspect." 433 U.S. at 309 n.14, citing *Castaneda* v. *Partida*, 430 U.S. 482, 496-97 & n.17 (1977). This makes

sense, since two standard deviations corresponds to statistical significance at the .05 level, which means in turn that "there exists at most a one in 20 possibility that the observed result could have occurred by chance." *Segar* v. *Smith*, *supra*, 738 F.2d at 1282-83 & n.28. *Hazelwood* stands for the point, therefore, that when a plaintiff has shown a disparity equal to two standard deviations or of statistical significance at the .05 level—and thus that there is only one chance in twenty that the disparity could be explained by chance—the plaintiff's evidence is normally sufficient to make out a case of intentional discrimination. See *Segar* v. *Smith*, *supra*, 738 F.2d at 1282-83 (several courts and the Department of Justice have taken the position that a disparity between the group available for a job and the group selected which is statistically significant at the .05 level is sufficient to support an inference of intentional discrimination); B. Schlei & P. Grossman, *Employment Discrimination Law* 1372 (1983) (same). See generally D. Baldus & J. Cole, *Statistical Proof of Discrimination* §§ 9.0-9.42 (1980 & Supp. 1986).

A plaintiff is not, of course, confined in a disparate treatment action to statistical evidence, and often the plaintiff's statistical case will be buttressed by other evidence supporting the claim of intentional discrimination. Examples of such other evidence include anecdotal evidence of discrimination, *Teamsters*, *supra*, 431 U.S. at 339; *Hazelwood*, *supra*, 433 U.S. at 303; a history of discrimination by the employer and ineffectual attempts by the employer to eradicate such discrimination, *Bazemore* v. *Friday*, 106 S. Ct. 3000, 3009 (1986); *Hazelwood*, *supra*, 433 U.S. at 303, 309 n.15; or "standardless and largely subjective [employment] procedures." *Hazelwood*, *supra*, 433 U.S. at 303.[10] There is no prescribed

[10] Courts have repeatedly recognized that evidence of subjective employment practices can buttress statistical evidence of disparate treatment. *E.g.*, *O'Brien* v. *Sky Chefs, Inc.*, 670 F.2d 864, 867

formula concerning when such nonstatistical evidence is needed to make out a case of disparate treatment; the question in each case is simply whether the sum of evidence presented by the plaintiff is sufficient to support the inference of intentional discrimination. *Bazemore* v. *Friday*, *supra*, 106 S. Ct. at 3009. See *Segar* v. *Smith*, *supra*, 738 F.2d at 1278 ("neither the presence nor the absence of specific anecdotal accounts alters the standard that a plaintiff's initial case must meet;" issue is whether plaintiff's "cumulative" evidence is "sufficient to support an inference of discrimination").

Once the plaintiff has made out a prima facie case of disparate treatment, whether by statistical evidence alone or by a combination of statistical and nonstatistical evidence, a burden of rebuttal shifts to the employer; this follows from the fact that if the employer is silent and the trier of fact believes the plaintiff's evidence, the plaintiff must prevail.

The sort of rebuttal evidence an employer will offer to a strong statistical and nonstatistical showing of intentional discrimination will typically include an attempt to discredit the nonstatistical evidence and to refute plaintiff's claim that a statistical disparity exists, by attacking the accuracy of plaintiff's statistics or offering alternative statistical analyses. Alternatively, the employer may offer evidence explaining the disparity shown by plaintiff's statistics, such as by "com[ing] forward with some additional job qualification * * * that the plaintiff class lacks, thus explaining the disparity." *Segar* v.

(9th Cir. 1982), *overruled on other grounds*, *Atonio* v. *Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc) ("subjective decisionmaking strengthens an inference of discrimination from general statistical data"); *Harris* v. *Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) ("Nonobjective evaluation systems may be probative of intentional discrimination, especially when discriminatory patterns result, because such systems operate to conceal actual bias in decisionmaking.")

Smith, supra, 738 F.2d at 1268; *Teamsters, supra*, 431 U.S. at 360 (on rebuttal to a pattern or practice showing, employer will try to demonstrate that the plaintiff's proof "is either inaccurate or insignificant").[11]

Under the *McDonnell Douglas* formulation, an employer may rebut a plaintiff's prima facie case simply by offering, through admissible evidence, a legitimate, nondiscriminatory reason for the plaintiff's non-selection. *McDonnell Douglas Corp.* v. *Green, supra*, 411 U.S. at 802; *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 255 (1981).[12] This minimal rebuttal burden is tailored to the minimal evidence a plaintiff must offer to make out a prima facie case of intentional discrimination under *McDonnell Douglas* (see p. 12, note 9, *supra*); given plaintiff's minimal showing, evidence by the defendant of a legitimate, nondiscriminatory reason for plaintiff's non-selection is sufficient to allow a factfinder to decline to draw the inference of intentional discrimination. See *Burdine, supra*, 450 U.S. at 254-55 ("The

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[11] If, in rebuttal to a statistical case of disparate treatment, the employer offers evidence that a specific employment practice, such as an experience requirement, explains the disparity, the case will be transformed into a disparate impact case, and the employer will bear the burden of proving that the employment practice it has identified is justified by business necessity. *Segar* v. *Smith, supra*, 738 F.2d at 1270, 1288; *Latinos Unidos de Chelsea en Accion (Lucha)* v. *Secretary of Housing and Urban Development*, 799 F.2d 774, 787 n.22 (1st Cir. 1986); *Lewis* v. *Bloomsburg Mills*, 773 F.2d 561, 571 n.16 (4th Cir. 1985); *Griffin* v. *Carlin*, 755 F.2d 1516, 1526-28 (11th Cir. 1985); *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 521 F. Supp. 656, 662 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984). See generally, Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 1005-06 (1982).

[12] Because the "legitimate, nondiscriminatory reason" must be presented through "admissible" evidence, neither "[a]n articulation not admitted into evidence," "an answer to the complaint," nor "argument of counsel" will be sufficient. *Texas Dep't of Community Affairs* v. *Burdine, supra*, 450 U.S. at 255 n.9.

explanation provided must be legally sufficient to justify a judgment for the defendant.")

By contrast, when the plaintiff has offered strong statistical evidence or a combination of strong statistical and nonstatistical evidence supporting the inference of intentional discrimination, an employer must do more than articulate a "legitimate, nondiscriminatory" explanation for plaintiff's evidence to adequately rebut the plaintiff's case. This follows from the fact that if plaintiff has presented strong statistical and nonstatistical evidence of intentional discrimination, the mere articulation of a nondiscriminatory explanation for that evidence —without more—will be insufficient to allow a factfinder to find for the employer. Thus, in *Paxton* v. *Union Nat'l Bank*, 688 F.2d 552, 566 (8th Cir. 1982), the court of appeals reversed the district court's finding of no discrimination in promotions, where the plaintiffs presented strong statistical and nonstatistical evidence of intentional discrimination, and the employer's "vague assertion that black employees as a whole within the bank were not as qualified as the white employees," and "ad hoc, contradictory and conflicting explanations" for individual promotion decisions "[did] not even begin to explain the broad pattern of promotional discrimination" shown by plaintiffs. See also *Teamsters*, *supra*, 431 U.S. at 343 n.24 (" 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion' "); *Segar* v. *Smith*, *supra*, 738 F.2d at 1269-70 ("in the class action pattern or practice case[,] the strength of evidence sufficient to meet [the employer's] rebuttal burden will typically need to be much higher than the strength of the evidence sufficient to rebut an individual plaintiff's low-threshold *McDonnell Douglas* showing"); *Vuyanich* v. *Republic Nat'l Bank of Dallas*, 521 F. Supp. 656, 663 (N.D. Tex. 1981), *vacated on other grounds*, 723 F.2d 1195 (5th Cir. 1984) (same).

Once the defendant has offered rebuttal evidence, the plaintiff may attempt to discredit the rebuttal or may instead rely solely on his or her initial proofs. *Burdine*, *supra*, 450 U.S. at 256; *Segar* v. *Smith*, *supra*, 738 F.2d at 1270 n.15. At that point, the issue for the trier of fact is whether, "in light of all the evidence presented by both the plaintiff and defendant * * * it is more likely than not that impermissible discrimination exists." *Bazemore* v. *Friday*, *supra*, 106 S. Ct. at 3009. If plaintiff's statistical evidence, significant to two or three standard deviations, has not been undermined and defendant has not convincingly (and lawfully) justified the disparity, plaintiff should prevail.[13]

The evidence presented by a plaintiff in a disparate impact challenge to a subjective employment practice will be similar in many respects to that presented in a disparate treatment challenge. The plaintiff will offer evidence of a statistical disparity between the race or sex of the group selected by the practice, and the race or sex of the group available for the job, composed of the gen-

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[13] If a pattern or practice of discrimination is established, and a proceeding moves to the remedy stage, the burden of proof rules are different. As this Court held in *Teamsters*, *supra*, "proof of the pattern or practice [of discrimination] supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." Thus, at the remedial stage, plaintiffs "need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination." At that point, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." 431 U.S. at 362 (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 773 n.32 (1976)). Moreover, many courts have held that the employer's burden of proof at the remedy stage is by clear and convincing evidence. *E.g.*, *Trout* v. *Lehman*, 702 F.2d 1094, 1107 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984) & cases cited; *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 443-44 (5th Cir. 1974).

eral workforce, the qualified labor market, or actual applicants for the job. *E.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 329-30 (1977) (height and weight requirements for prison guards have a disparate impact on females where standards would exclude from employment 41.13% of the female population and only 1% of the male population).[14] As in disparate treatment actions, this Court has never defined precisely what magnitude of disparity is required to make out a case of disparate impact. The cases have referred to a showing that a requirement disqualifies a suspect group "at a substantially higher rate" than white applicants, *Griggs*, *supra*, 401 U.S. at 426; or that a given employment practice "select[s] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425. It is possible that a disparity less than two standard deviations might suffice. See, *e.g.*, D. Baldus & J. Cole, *supra*, § 9.221 (Supp. 1986).

Because employers frequently have selection procedures which combine many components, both subjective and objective, a plaintiff making a disparate impact challenge must be allowed to make a case—as plaintiffs may in disparate treatment actions—by showing that the selection procedure as a whole has produced a statistical disparity between the group selected under the procedure and the group available for the job. The plaintiff should not also have to identify which specific selection component caused the adverse impact. *E.g.*, *Griffin* v. *Carlin*, 755 F.2d 1516, 1523-25 (11th Cir. 1985). See also *Connecticut* v. *Teal*, *supra*, 457 U.S. at 458 (Powell, J., dissenting) ("our dis-

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[14] Because disparate impact suits necessarily challenge a series of employment decisions, they often proceed as class actions. But individual plaintiffs may also bring disparate impact claims. *E.g.*, *Coe* v. *Yellow Freight System*, 646 F.2d 444, 451 (10th Cir. 1981) (individual may bring a disparate impact claim so long as he satisfies requirement of standing by showing that he was affected by the practices alleged to have disparate impact).

parate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group") (emphasis in original). The data necessary for such an identification is often prohibitively expensive for plaintiffs to obtain and is more readily available to the employer. Moreover, limiting disparate impact analysis to cases in which the plaintiff is able to show that a particular component of a multi-component selection procedure caused adverse impact would completely exempt the situation when two or more components interact together to produce a disparate impact. See *Griffin* v. *Carlin*, *supra*, 755 F.2d at 1516, citing *Gilbert* v. *City of Little Rock*, 722 F.2d 1390, 1397-98 (8th Cir. 1983).

On the employer's side, the rebuttal evidence offered to a disparate impact showing will be similar in many respects to the rebuttal evidence offered in a disparate treatment action. Indeed, since plaintiff will often have presented the two types of analysis in the same case, employers must often deal with both at once. The rebuttal will likely involve an attack on plaintiff's statistics, either directly or by alternative statistical analyses. At this point, however, disparate impact and disparate treatment theories diverge. In a disparate impact case, once the plaintiff has proven that a given employment practice has adverse impact, the burden of proof shifts to the employer to show that the practice is job-related or justified by business necessity. *Griggs*, *supra*, 401 U.S. at 432 (in disparate impact cases, "Congress has placed on the employer the burden of showing that any given requirement [has] a manifest relationship to the employment in question."). Accord, *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329; *Connecticut* v. *Teal*, *supra*, 457 U.S. at 446-47. Thus, while an employer can defend against a disparate treatment challenge by rebutting plaintiff's showing of intentional discrimination, an employer must do more to defeat a showing of adverse im-

pact; the employer must prove that the employment practice is job-related or justified by business necessity.[15]

This critical difference between disparate impact and disparate treatment analysis demonstrates that confining challenges to subjective employment practices to disparate treatment theory would defeat a central purpose of Title VII. In *Griggs*, *supra*, 401 U.S. at 431, this Court held that Title VII was intended to proscribe not only "overt discrimination," "but also practices that are fair in form, but discriminatory in operation." Further, "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432 (emphasis in original). Thus, *Griggs* held, Congress intended in Title VII that employment practices with bad consequences (an adverse impact on a suspect group) must be justified, by business necessity or as job-related, to be lawful. *Id.* at 431. See also *Washington* v. *Davis*, *supra*, 426 U.S. at 248 (under *Griggs*, an employment practice "designed to serve neutral ends is nevertheless invalid, absent compelling jus-

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[15] Even if the employer proves a business necessity defense, the plaintiff may still prevail if he shows "that other tests or selection devices, without a similarly undesirable * * * effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425. Accord, *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329.

As in disparate treatment actions (see p. 18, note 13, *supra*), once an unjustified disparate impact is established and the case moves to the remedy stage, individual plaintiffs need only show that they were affected by the employment policy with adverse impact, and the employer then bears the burden of proving that the plaintiff would have been denied the employment opportunity absent discrimination. *E.g.*, *Association Against Discrimination in Employment, Inc.* v. *City of Bridgeport*, 647 F.2d 256, 289 (2d Cir. 1981); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625, 637 (4th Cir. 1978). Again, as in disparate treatment actions, courts have held that the employer's burden of proof at the remedy stage is by clear and convincing evidence. *E.g.*, *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 453 (7th Cir. 1976).

tification, if in practice it benefits or burdens one race more than another"). Confining challenges to subjective employment practices to disparate treatment analysis would, therefore, defeat this central purpose of Title VII. Under disparate treatment analysis, subjective employment practices with an adverse impact on suspect groups would not need to be justified to be lawful, so long as they were not found to be intentionally discriminatory.[16]

C. Allowing Disparate Impact Challenges to Subjective Employment Practices Will Not Leave an Employer Without a Defense to a Disparate Impact Showing.

In its *amicus* brief on petition for certiorari, the United States suggests that an exemption from disparate impact analysis for subjective employment practices is warranted because such practices "may not be susceptible to validation or other such objective substantiation." U.S. Cert. Brief at 15. Thus, the argument goes, to apply disparate impact analysis to employment practices involving subjectivity would leave an employer "with no possible defense" to a disparate impact showing. *Id.* at 19-20.

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[16] It should also be noted that confining challenges to subjective employment practices to disparate treatment analysis would encourage employers to make most of their practices subjective. Courts have recognized that subjective practices can more easily mask discriminatory motivation than objective ones. *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985) (subjective evaluations involving white supervisors provide a "ready mechanism" for racial discrimination). Accord, *Rowe* v. *Cleveland Pneumatic Co.*, 690 F.2d 88, 93 (6th Cir. 1982); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972). See also p. 14, note 10, *supra*. Yet it could not have been the intent of Congress to encourage employers to use subjective devices in place of objective criteria. *Atonio* v. *Wards Cove Packing Co.*, *supra*, 810 F.2d at 1485 ("It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods.") *Griffin* v. *Carlin*, *supra*, 755 F.2d at 1525 (same).

This Court has never held, however, that formal validation is the only defense to a showing that an employment practice has adverse impact. Instead, the cases have spoken of the need for the employer to show that the employment practice has a "manifest" or "demonstrable" relationship to the job in question, *Griggs*, *supra*, 401 U.S. at 431, 432; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425; or that it is "necessary to safe and efficient job performance * * *." *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 332 n.14. See also *Griggs*, *supra*, 401 U.S. at 431 (the "touchstone" of the defense to a disparate impact claim is a showing of "business necessity"); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977) (issue is whether "company's business necessitates the adoption" of employment practice at issue). Moreover, this Court has held that the defense may be made out on evidence other than a formal validation study. *E.g.*, *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 & n.31 (1979) (even if employer's rule excluding all users of narcotics and certain other drugs from employment had an adverse impact, rule would be sustained because employer has shown that rule serves employer's "legitimate employment goals of safety and efficiency"). See generally B. Schlei & P. Grossman, *supra*, at 164 (courts have generally not required that education and other nonscored employment criteria be validated, allowing job-relatedness to be shown by other evidence), citing, *e.g.*, *Spurlock* v. *United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) (upholding college degree requirement for airline pilots based on testimony by airline officials); *Castro* v. *Beecher*, 459 F.2d 725, 735 (1st Cir. 1972) (upholding high school diploma requirement for police officers based on Kerner Commission recommendation that all police officers have a high level of education).

Thus, an employer may be able to sustain a subjective employment practice with adverse impact that cannot feasibly be validated if, for example, the employer offers

evidence to show that continued use of the practice is essential to its business, and that it has instituted safeguards to ensure that discretion is focused on job-related variables and that subjectivity is not being used to mask intentional or unintentional discrimination. *E.g.*, *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 450-51 (7th Cir. 1976) (business necessity defense to subjective promotion process not made out where "supervisory recommendations play an important role" in promotions, but foremen, who are all white, "have no objective way of rating the employees," and have no "written guidelines delineating the criteria" for which they are looking); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972) (subjective promotion/transfer procedures fail business necessity test where foremen's recommendations are the "indispensable single most important factor," but foremen receive "no written instructions" on criteria to be applied and hourly employees are not notified of jobs available or qualities necessary for promotion).[17]

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[17] The Uniform Guidelines provide that in circumstances when an employment procedure has adverse impact and an employer "cannot or need not utilize the validation techniques contemplated by these guidelines," the employer should "justify continued use of the procedure in accord with Federal law." 29 C.F.R. § 1607.6 (B)(1) & (2) (1986). Since the only method under "Federal law" to justify an employment procedure with adverse impact is to show that the procedure is job-related or justified by business necessity, the Guidelines clearly anticipate that those defenses may be made out in some circumstances without formal validation. This interpretation of the Guidelines is confirmed in the EEOC's questions and answers designed to clarify the Guidelines. 44 Fed. Reg. 11996 (March 2, 1979). There, in response to a question concerning whether a selection procedure could be justified without validation, the EEOC stated that, under *Griggs*, a "selection procedure could be used if there was a business necessity for its continued use," and that "therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business * * *." *Id.* at 12002.

Furthermore, there is no apparent reason why certain subjective criteria cannot be validated in the same manner as objective criteria. As Professor Bartholet points out:

> "The validity of a written test is traditionally established by correlating the scores of candidates who passed the test and are on the job with indicia of their job performance. A subjective assessment process, like a written test, can be scored even if only for the purpose of conducting a validity study. Alternatively, an employer can establish the validity of subjective processes by proving that the behavior assessed by the process represents a fair sample of the behavior required in the job at issue, or that the subjective process measures the knowledge, skills or abilities that are the necessary prerequisites to the job.
>
> "The industrial psychology literature * * * contains numerous descriptions of validity studies of the most commonly used subjective processes, such as interviews, the evaluation of biographical data, and assessment center techniques." (Citations omitted.)

Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 987-88 (1982). It may be that validation techniques developed for certain objective employment practices, such as scored tests, will have to be modified, or new validation techniques developed for subjective practices such as interviews. *Id.* at 989, 985 n.133. But these issues are not before the Court at this time. The fact that validation of some subjective employment practices may, in certain cases, be difficult or call for new validation techniques, does not justify the creation by this Court of an across-the-board exemption from disparate impact analysis for all employment practices involving subjective decisionmaking.

CONCLUSION

If an employer need make no business-related defense of his subjective or discretionary employment practices, such practices may have a substantially adverse impact on suspect groups for no good reason whatsoever. Title VII should not be construed to permit such a result, and thus the disparate impact analysis of *Griggs* should not be restricted in ways that undercut a central purpose of Title VII. For the reasons stated above and in the Brief for the Petitioner, *amicus* Lawyers' Committee urges the Court to reverse the decision below.

Respectfully submitted,

CONRAD K. HARPER
STUART J. LAND
Co-Chairmen
NORMAN REDLICH
Trustee
WILLIAM L. ROBINSON
JUDITH A. WINSTON
RICHARD T. SEYMOUR
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1400 "Eye" Street, N.W.
Washington, D.C. 20005
(202) 371-1212

JOHN TOWNSEND RICH *
ELIZABETH RUNYAN GEISE
NANCY B. STONE
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

Attorneys for Amicus Curiae
Lawyers' Committee for Civil Rights
Under Law

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* Counsel of Record

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Supreme Court of the United States
OCTOBER TERM, 1987

CLARA WATSON,
Petitioner,

v.

FORT WORTH BANK & TRUST,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

DONALD N. BERSOFF
(Counsel of Record)
LAUREL PYKE MALSON
DONALD B. VERRILLI, JR.
ENNIS FRIEDMAN & BERSOFF
1200 - 17th Street, N.W., Suite 400
Washington, D.C. 20036
(202) 775-8100
Attorneys for Amicus Curiae
American Psychological Association

September 14, 1987

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BRIEF FOR *AMICUS CURIAE* AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The American Psychological Association ("APA") is a nonprofit, scientific, and professional organization with more than 65,000 members. It has been the major association of psychologists since 1892, and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. Among APA's major functions are the promotion of psychological research, the dissemination of information regarding human psychological behavior, the promulgation of standards governing scientific and professional practice, including assessment, and, as reflected in its Bylaws, the "advance[ment] of psychology as a science and profession." A substantial number of APA's members are concerned with the development and validation of assessment devices for personnel selection in the employment context, including the more than 2500 members who belong to the APA's Division of Industrial and Organizational Psychology and the 1500 members who belong to its Division of Evaluation and Measurement.

The APA has participated as *amicus* in many cases in this Court involving social science issues, including *Kentucky v. Stincer*, 107 S. Ct. 2658 (1987) (effects on child victims of sex abuse of testifying in the presence of their alleged abusers); *Colorado v. Connelly*, 107 S. Ct. 515 (1986) (behavioral effects of command hallucinations); and *Lockhart v. McCree*, 106 S. Ct. 1758 (1986) ("conviction-proneness" of "death-qualified" juries). APA contributes *amicus* briefs only where it has special knowledge to share with the Court. APA regards this as one of those cases. In this instance, APA wishes to inform this Court of the state of current scientific thought regarding validation of personnel assessment devices, including subjective selection criteria and procedures such as those used by respondent in this case.

Petitioner and respondent have consented to the filing of this *amicus* brief. Their letters of consent are on file with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

APA addresses in this brief an essential and inherent issue in this case. *Amicus* will leave it to the parties to argue whether disparate impact analysis under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, is properly applied to review the legality of subjective assessment devices for the hiring and promotion of employees. However, insofar as a negative answer is grounded in the assumption that subjective assessment devices are not amenable to psychometric scrutiny in the same way that ability tests are, such an assumption is contrary to fundamental and generally accepted scientific principles of measurement. The most frequently articulated reason for limiting disparate impact analysis to objective criteria and procedures—that only objective criteria and procedures yield sufficient statistical data to permit scientific validation—is not supported by the relevant social science literature. Indeed, the view that only objective selection criteria and procedures can be clearly identified, applied equally to all applicants, and statistically evaluated has been discredited by the extensive work of industrial psychologists and other assessment specialists. Subjective selection devices *can* be scientifically validated for the assessment of individuals for hiring, promotion, or other selection decisions in the employment context. The choice of analyses under Title VII, therefore, should not turn on whether the challenged employment practices are based on objective or subjective evaluations of applicants.

The APA's STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985) [hereinafter STANDARDS] provide a framework for the evaluation and validation of testing and other assessment devices, including such subjective devices as interviews, behavioral observations, and rating scales. The STANDARDS are consistent with the PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL

SELECTION PROCEDURES (1987) [hereinafter PRINCIPLES] published by the Society for Industrial and Organizational Psychology.[1] Furthermore, the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 1607.1, *et. seq.* [hereinafter Uniform Guidelines] were explicitly intended to be consistent with the STANDARDS. *Id.* at § 1607.5(C). Such technical standards were clearly contemplated by the drafters of Title VII when they referred to the use of "professionally developed" assessment devices by employers. 42 U.S.C. § 2000e-2(h). When examined in light of the STANDARDS, PRINCIPLES, and Uniform Guidelines, it is clear that the procedures respondent used in this case to evaluate petitioner for promotion were not shown to be scientifically valid, *i.e.*, appropriate, meaningful, or useful for the inferences drawn from them. *See* Part I(B). More importantly, however, the STANDARDS and PRINCIPLES provide ample guidelines for how those procedures, notwithstanding their subjective nature, could have been validated.

The recognition that subjective assessment procedures may be validated is critical to the effectuation of the underlying goals of Title VII. Subjective procedures, like those of a more objective nature, should be required to be validated for specific jobs in any case where employers use those procedures as a defense to a prima facie case of discrimination, whether the claim is analyzed under a disparate treatment or a disparate effect theory. Only under such a rule will employers be inhibited from making personnel decisions based on unlawful and irrelevant factors. Should the Court in this case implicitly approve the use of unvalidated selection procedures as a defense to any Title VII claim, employers will have greater incentive to resort more readily to subjective assessment de-

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[1] The Society is an integral component of the *amicus* and is also known as Division 14 of the APA (Division of Industrial and Organizational Psychology). Until adopted by *amicus* as a whole, the PRINCIPLES are the formal policy only of Division 14. However, they are "intended to represent the consensus of professional knowledge and thought as it exists today. . . ." *Id.* at 3.

vices, which would facilitate covert and discriminatory decisionmaking and severely undermine the right of equal employment opportunities for those classes of persons otherwise protected by Title VII.

ARGUMENT

I. BECAUSE SUBJECTIVE ASSESSMENT DEVICES CAN, AND SHOULD, BE SCIENTIFICALLY VALIDATED, THE USE OF SUBJECTIVE SELECTION CRITERIA AND PROCEDURES BY EMPLOYERS SHOULD NOT PRECLUDE REVIEW UNDER ANY TITLE VII THEORY.

Amicus relies on petitioner and other supporting *amici* to establish the applicability of disparate impact analysis under Title VII to subjective selection criteria for hiring and promotions. *Amicus* wishes to share with the Court its unique knowledge of testing and other assessment devices, and the validation of such devices, so that the Court's decision regarding the proper standard of analysis will be informed by relevant social science data. However, should the Court ultimately determine that disparate treatment analysis is the appropriate standard of review for subjective assessment devices in the employment context, *amicus* believes that such a holding in no way obviates the principle that such devices can and should be validated for the particular job in question.

A. *Professional Standards Concerning the Technical Adequacy of Selection Devices are Applicable to the Subjective Methods Used by Respondent.*

At issue in this case are three selection devices by which petitioner was evaluated for promotion by respondent's agents—interviews, supervisor's ratings, and experience requirements. Respondent characterizes these as subjective assessment procedures, in contrast to such procedures as multiple choice standardized paper-and-pencil tests which are typically classified as objective measures. Although in the context of personnel assessment procedures the term "subjective" is not easily defined, the concept has been used to refer variously to

procedures in which "judgment or discretion [is exercised] on the part of the evaluator" [2] or which lack any "neutral" factors,[3] to assessment devices of a "non-mechanical, operator-dependent" nature,[4] or to appraisals not based on " 'hard data,' such as production records [or] attendance." [5] Most simply, "Measures that require the statement of opinion, beliefs, or judgments are considered subjective." [6] Regardless of the particular definition, they are consistent with the widely-held view that subjective devices used by employers for hiring or promotion purposes are inherently less scientific, less quantifiable, less reliable, and less facially neutral than their objective counterparts.[7] For this reason, it has been as-

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[2] Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 WM. & MARY L. REV. 45, 48 (1979).

[3] 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 15-87 (1986).

[4] Brief of United States as *Amicus Curiae* on Petition for Writ of Certiorari at 13 [hereinafter Brief of United States].

[5] Kleiman & Durham, *Performance Appraisal, Promotion and the Courts: A Critical Review*, 34 PERSONNEL PSYCHOLOGY 103, 114 (1981) [hereinafter Kleiman & Durham].

[6] I. GOLDSTEIN, TRAINING IN ORGANIZATIONS 136 (2d ed. 1986) [hereinafter Goldstein]. "For example, rating scales are subjective measures, while measures of absenteeism are more objective. (However, supervisors' ratings of the absenteeism level of employees could turn that measure into a subjective criterion)." *Id.*

[7] "[S]ubjective measures are affected by the difficulties that one individual has in rating another without bias." *Id.* at 136-137. These difficulties, however, are not due to any inherent characteristics of subjective measures but to the failure of employers to apply standard principles of test construction to subjective measures. It is not intrinsic to such devices to be unquantifiable. When properly developed, they are amenable to scoring and objective analysis. For example:

> rating scales have been the most commonly employed measures in applied settings. . . . [One] reason is that it is simple to throw together a rating scale with a few traits . . . and delude yourself into believing that you have a useful measure of performance. Professionals . . . know that the *steps in*

serted that subjective selection methods and criteria are not susceptible to scientific "validation" or any other psychometric scrutiny. See, *e.g.*, Brief of United States, *supra* note 4, at 15, and references therein.

This view is fundamentally at odds with the universal judgment of those most experienced and knowledgeable in techniques of measurement and evaluation generally, and in the appraisal of employee performance specifically. The most authoritative source for the standards to be applied to determine the technical adequacy of assessment devices, the appropriateness of specific applications of these devices, and the reasonableness of inferences based on the results of these devices are the STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1985), a joint publication of the *amicus* APA, the American Educational Research Association ("AERA"), and the National Council on Measurement in Education ("NCME").[8]

Consistent with the STANDARDS, the Division 14 PRINCIPLES FOR THE VALIDATION AND USE OF PERSONNEL SE-

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the process are very similar for objective and subjective measures and that shortcuts do not work in either case.

Id. at 137 (emphasis added).

[8] The 1985 STANDARDS represent the most modern expression of professional and scientific thinking concerning technical advances in psychological assessment. Its predecessor documents are, APA, *Technical Recommendations for Psychological Tests and Diagnostic Techniques* (1954); APA, *Standards for Educational and Psychological Tests and Manuals* (1966); and AERA, APA, NCME *Standards for Educational and Psychological Tests* (1974).

The 1966 and 1974 forerunners of the current STANDARDS have been cited with approval by this Court and in a variety of lower federal cases. *See, e.g., Washington v. Davis*, 426 U.S. 227, 247 n.13 (1976); *Debra P. v. Turlington*, 644 F.2d 397, 405 n.10 (5th Cir. 1981); *Douglas v. Hampton*, 512 F.2d 976, 984-986 (D.C. Cir. 1975) (see especially *id.* at 984 n.59 where the court called the 1966 edition "the universally recognized professional authority"); *Harless v. Duck*, 14 FEP Cases 1616, 1624 n.5 (N.D. Ohio 1977) (stating that the "courts have almost unanimously agreed that the

LECTION PROCEDURES (1987) apply the more general guidelines of the STANDARDS to the specific problems of making decisions in the context of employee selection, placement, and promotion and provide, *inter alia*, "principles for the application and use of valid selection procedures, and information that may be helpful to personnel managers and others responsible for authorizing or implementing validation efforts." PRINCIPLES at 2.[9]

Of relevance as well are the Uniform Guidelines. "The provisions of these guidelines . . . are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards . . . prepared by a joint committee of the" APA, AERA, and NCME. 29 C.F.R. § 1607.5(C). They "incorporate a single set of principles which are designed to assist employers . . . to comply with requirements of Federal law prohibiting employment practices which discriminate on the grounds of race. . . ." *Id.* at § 1607.1(B).

The STANDARDS, PRINCIPLES, and Uniform Guidelines apply to a broad range of selection procedures, not merely to the traditional objective measures commonly denominated as tests. Although the full title of the STANDARDS uses the word "testing," the term is generic and refers to "standardized ability . . . instruments, diagnostic and evaluative devices, interest inventories, personality inventories, and projective instruments." STANDARDS at 3. The term also includes samples of observable behavior "relevant to . . . employment decisionmaking." *Id.* at 4. *Amicus*, AERA, and NCME unequivocally view the

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[1974] APA guidelines provide persuasive standards for evaluating claims of job relatedness").

[9] The 1987 PRINCIPLES are a revision of the original 1980 version. "The purposes of the revision are to bring the PRINCIPLES up to date scientifically, to make them consistent with the STANDARDS, and to reduce possible ambiguities regarding good practice in the use of selection procedures in making employment decisions." PRINCIPLES at 1.

STANDARDS as useful and applicable "to the entire range of assessment techniques." *Id.*[10]

Similarly, the Division 14 PRINCIPLES are not applicable solely to standardized paper-and-pencil tests. They are explicitly intended to aid employers who make hiring and promotion decisions to choose, select, develop, evaluate, and use all personnel selection devices, including "performance tests, . . . personality [and] interest inventories, . . . biographical data forms or scored application blanks, interviews, . . . experience requirements, . . . appraisals of job performance, . . . [and] estimates of advancement potential." PRINCIPLES at 1.

Finally, the Uniform Guidelines "provide a framework for determining" not only "the proper use of tests" but "other selection procedures" as well. 29 C.F.R. § 1607.1 (B). They plainly "apply to tests and other selection procedures which are used as a basis for any employment decision[,] including "hiring and promotion." *Id.* at § 1607.2(B).[11]

In sum, then, it is the universal professional judgment that the assessment devices used by respondent in deciding not to promote the petitioner can properly be scrutinized under the applicable scientific and professional standards, principles, and guidelines concerning the evaluation of the psychometric soundness of such devices.[12] In the present case, those devices were not sub-

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[10] Such "instruments . . . are called tests here to indicate that the standards also apply to these instruments." *Id.* at 4-5.

[11] *See also, id.*, at § 1607.15(A)(1) (referring to selection procedures "either standardized or not standardized").

[12] *See, e.g.*, B. SCHNEIDER & N. SCHMITT, STAFFING ORGANIZATIONS 14 (2d ed. 1986) [hereinafter Schneider & Schmitt]:

> Typically we think of a test as an examination of some kind responded to with paper and pencil. . . . In fact, industrial psychologists and the Uniform Guidelines on Employee Selection Procedures (1978) have defined the word "test" in much broader terms and the courts have adopted this definition. In brief, a test is defined as any form of collecting information

jected to any such scrutiny to determine if they were valid for the purpose for which they were used.

B. *There are Generally Accepted Strategies for Establishing the Validity of Subjective Methods of Employee Selection.*

There are many elements involved in the construction, development, and evaluation of an assessment instrument. Industrial psychologists and others who create a test or other selection procedure must choose the domain to be assessed, construct the items to which test takers will respond or select the behaviors to be observed, develop scoring scales and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound. *See* STANDARDS at 9-37. The psychometric soundness of an instrument depends primarily on its being reliable [13] and valid. Although both qualities are essential, there is no doubt that "validity is the most important consideration in test evaluation." STANDARDS at 9.[14]

> when that information is used as a basis for making an employment decision. So, interviews are tests, as are application blanks, . . . performance appraisals used as a basis for making promotions (which, obviously are selection decisions), and any other kind of information used for making employment decisions.

Accord Friedman & Williams, *Current Use of Tests for Employment in* 2 ABILITY TESTING 99-100 (A. Wigdor & W. Garner eds. 1982) published by The National Academy of Sciences (acknowledging that the definition of selection procedures has extended to the full range of assessment devices, including interviews and are to be scrutinized according to the same guidelines used to evaluate standardized tests). *See also Brito v. Zia*, 478 F.2d 1200 (10th Cir. 1973) (holding that subjective observations by employer of minority employees had to be supported by empirical evidence of validity).

[13] "*Reliability* refers to the degree to which test scores are free from errors in measurement." STANDARDS at 19. The more reliable a test score the more consistent, dependable, or repeatable it will be. *See* PRINCIPLES at 39.

[14] "Undoubtedly the most important question to be asked about any psychological test concerns its validity . . . ." A. ANASTASI,

Validation refers to the process by which psychologists ascertain the degree to which certain inferences from a particular assessment device are appropriate, meaningful, or useful. *See* STANDARDS at 9; PRINCIPLES at 4. A test is valid if the proposed interpretation of scores proves to be sound and relevant. *See Cronbach*, *supra* note 14, at 125. Validity "concerns *what* the test measures and how well it does so. It tells us what can be inferred from test scores." Anastasi, *supra* note 14, at 131. When a selection procedure or device is said to be "validated," psychologists understand that the predictions inferred from the scored result of the procedure or device have a high rate of accuracy. For validation to be meaningful, it must predict performance of a *particular* task or set of tasks or other job relevant behavior of particular concern to the employer. Thus, selection procedures or devices are validated for a particular job when they have been demonstrated scientifically to make reliable and meaningful distinctions between individuals on the basis of their ability to perform particular tasks with competence or to function successfully in a particular job.[15] "The simple psychometric fact that test validity must be ascertained for specific uses of the test has long been familiar . . . . An invalid test or one that includes elements not related to the job under consideration may unfairly exclude minority group members who could have performed the job satisfactorily." Anastasi, *supra* note 14, at 432.

Validity "is a unitary concept." STANDARDS at 9. However, within the unifying theme of determining the

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PSYCHOLOGICAL TESTING 27 (5th ed. 1982) [hereinafter Anastasi]. "Obviously, no aspect of a test is more important than validity . . . ." L. CRONBACH, ESSENTIALS OF PSYCHOLOGICAL TESTING 125 (4th ed. 1984) [hereinafter Cronbach]. The texts by Anastasi and Cronbach are considered the most authoritative basic treatises on the topic of psychological measurement.

[15] "Only as abbreviation is it legitimate to speak of 'the validity of a test'; a test relevant to one decision may have no value for another. So users must ask, 'How valid is this test for the decision made?' or 'How valid are the interpretations I am making of the scores?'." Cronbach, *supra* note 14, at 125.

relevance or interpretability of scored results, "[t]he validity of any inference can be determined in a variety of ways." PRINCIPLES at 4. "[T]he various means of accumulating validity evidence have been grouped into categories called content-related, criterion-related, and construct-related evidence of validity." STANDARDS at 9.[16] In the context of personnel selection procedures, content-validation involves a determination that the assessment instrument accurately reflects a representative sample of important aspects of job performance or job-required knowledge. *See* PRINCIPLES at 19.[17] Criterion-related validation involves a determination that the assessment instrument is predictive of, or significantly correlated with, important elements of job performance or work behavior. *See* PRINCIPLES at 6.[18] Construct validation

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[16] "[I]nsofar as the courts have interpreted the test standards and . . . the Uniform Guidelines . . . to mean that content, criterion, and construct validity are distinct forms of validation, those interpretations are oversimplified, if not erroneous." Bersoff, *Testing and the Law*, 36 AM. PSYCHOLOGIST 1047, 1051 (1981). These three approaches should be viewed as subsets within a unifying and common framework. *See* Guion, *On Trinitarian Doctrines of Validity*, 11 PROF. PSYCHOLOGY 385, 386 (1980); Messick, *Test Validity and the Ethics of Assessment*, 35 AM. PSYCHOLOGIST 1012 (1980); Tenopyr, *Content-Construct Confusion*, 30 PERSONNEL PSYCHOLOGY 47 (1977). The three approaches may be discussed "separately only to acknowledge traditional presentations and avoid an abrupt departure from tradition." PRINCIPLES at 4.

[17] "In general, content-related evidence demonstrates the degree to which the sample of items, tasks, or questions on a test are representative of some defined universe or domain of content." STANDARDS at 10.

[18] "Criterion-related evidence demonstrates that test scores are systematically related to one or more outcome criteria . . . ." STANDARDS at 11.

> Two designs for obtaining criteria-related evidence—predictive and concurrent—can be distinguished. A predictive study obtains information about the accuracy with which early test data can be used to estimate criterion scores that will be obtained in the future. A concurrent study serves the same purposes, but obtains prediction and criterion information simultaneously.

Id.

involves a determination that the assessment instrument accurately measures the degree to which individuals possess identifiable characteristics which have been determined to be important for successful job performance. *See* PRINCIPLES at 25.[19]

Each of the validation strategies requires the employer to engage in an essential prerequisite activity. Through a process known as job analysis, the employer must clearly identify the most important components of successful job performance. "Job analysis is essential to the development of a content-oriented procedure or to the justification of a construct important to job behavior." PRINCIPLES at 5. "In some situations, the major purpose of job analysis may be to provide information from which criterion measures may be developed." *Id.* at 6. Satisfying this essential prerequisite requires an analysis of the job in question, and a clear articulation of the knowledge, skills and abilities ("KSAs"), or other personal characteristics or behaviors the exhibition of which determine proficiency at that job.[20] These data can be secured through judgments of job incumbents, their supervisors, personnel specialists, the professional judgment of job experts, and through training manuals,

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[19] "The evidence classed in the construct-related category focuses primarily on the test score as a measure of the psychological category of interest . . . . Such characteristics are referred to as constructs because they are theoretical constructions about the nature of human behavior." STANDARDS at 9.

This Court has summarized these approaches in *Washington v. Davis*, 426 U.S. at 247 n.13, as it understood them to be described in the 1966 version of the STANDARDS.

[20] Although a job analysis is crucial to all validation strategies it has been emphasized more clearly in the context of content-oriented validity. *See, e.g.*, "Content validation should be based on a thorough and explicit definition of the content domain of interest. For job selection, classification, and promotion, the characterization of the domain should be based on job analysis." Standard 10.4, STANDARDS at 60-61. But it is required for criterion-related validity, *see* Standard 10.1, STANDARDS at 60, and construct-related validity, *see* Standard 10.8, STANDARDS at 61, as well.

job descriptions, and other written information. *See* PRINCIPLES at 19-20; Schneider & Schmitt, *supra* note 12, at 47; Thompson & Thompson, *Court Standards for Job Analysis in Test Validation*, 35 PERSONNEL PSYCHOLOGY 865 (1982). In addition, the relative importance of these KSAs must be determined. Finally, a close link between the assessment device and the identified job content or behavioral characteristic (construct) must be established. Standard 10.5, STANDARDS at 61; *see also* Standard 10.8. *Id.*[8]

In sum, then, the use of particular selection procedures by an employer reflects his or her implicit assumption that some important aspect of behavior on the job can be predicted from an individual's scores or performance on the chosen selection procedure. The critical factor underlying this assumption is the accumulation of evidence or data to support an inference of the chosen procedure's job-relatedness. This can be accomplished only through the various strategies of validation.

Validation is no less applicable to subjective assessment devices than to objective ones. In both cases, accurate predictors of job performance are essential to assist employers in selecting or promoting individuals who will best serve their needs, as well as to provide a method of personnel selection that inhibits consideration of non-job-related factors such as an individual's race. Indeed, several commentators have noted the emphasis placed by many courts and employers on objectivity, at the expense of validity, *i.e.*, requiring the use of certain "neutral appearing" objective tests to measure job performance, even where the validity of those criteria is clearly questionable.[22] Because of the role that validation plays in

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[21] Several books summarize job analysis procedures and discuss their relative utility in various situations. *See, e.g.*, S. GAEL, JOB ANALYSIS: A GUIDE TO ASSESSING WORK ACTIVITIES (1983); E. LEVINE, EVERYTHING YOU EVER WANTED TO KNOW ABOUT JOB ANALYSIS (1983); E MCCORMICK, JOB ANALYSIS: METHODS AND APPLICATIONS (1979).

[22] *See, e.g.*, Kleiman & Durham, *supra* note 5, at 117-118.

enhancing the quality of selection procedures and reducing the potential for discrimination, an employer should be required to provide evidence of the validity of those procedures whether the employer chooses to use ones labeled as subjective or objective.

C. *To Reduce Sources of Bias the Validity of Each of the Selection Devices Used by Respondent Must and Can Be Established by Generally Accepted and Accessible Validation Strategies.*

Industrial psychologists routinely use the three strategies for validating assessment devices described in Part I(B) to validate both objective devices such as standardized ability tests and interest inventories, and purely subjective or multi-component devices such as interviews, performance appraisal ratings, constructed performance tasks, nonscored experience and biographical data intake sheets, and structured behavioral sample tests. *See generally, e.g.*, Goldstein, *supra* note 6; Schneider & Schmitt, *supra* note 12.

1. *The interview.*

The employment interview, the technique most heavily relied upon by respondent in this case, is probably more widely used than any other selection tool. *See* H. HENNEMAN, D. SCHWAB, J. FOSSUM, & L. DYER, PERSONNEL/HUMAN RESOURCE MANAGEMENT (1980); Ulrich & Trumbo, *The Selection Interview Since 1949*, 64 PSYCHOLOGY BULL. 100 (1965). However, because most employers are unaware of research which has determined which variables are reliably, validly, and uniquely assessed in the selection interview, *see* Schmitt, *Social and Situational Determinants of Interview Decisions: Implications for the Employment Interview*, 29 PERSONNEL PSYCHOLOGY 79, 97 (1976), the employment interview is typically subject to interview bias of various types. *See* Arvey, *Unfair Discrimination in the Employment Interview: Legal and Psychological Aspects*, 86 PSYCHOLOGY BULL. 736 (1982). The most commonly known bias is "halo effect," where an interviewer may be unduly influ-

enced by a single trait which colors his/her judgment of the employee's other traits. *See* Anastasi, *supra* note 14, at 612. A related problem is "stereotyping" in which an employee is judged "based on his or her group membership [e.g., race] rather than on the basis of his or her unique characteristics" Schneider & Schmitt *supra* note 12, at 388-389. Another concern is the "similar-to-me phenomenon" in which the interviewer adopts the attitude "I am wonderful and I have the following attitudes and opinions, so if candidates I interview have the same attitudes and opinions, they must also be wonderful." *Id.* at 389. "When combined with stereotyping, the similar-to-me phenomenon can be a potent determinant of interviewer decision-making." *Id.*

Interviews can afford an opportunity for direct observation of samples of behavior, albeit limited, manifested during the interview and serve to evoke life-history data, both of which can be important predictors of future performance, if interviews are developed and conducted using generally accepted standards. *See* Anastasi, *supra* note 14, at 610.[23] Several recent studies, reviewed by noted scholars, show that interview judgments can be valid indicators of subsequent job performance. *See*

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[23] A variety of available sources discuss methods, applications, and effectiveness of interviewing, and research on the interviewing process. *See, e.g.*, W. BINGHAM, B. MOORE & J. GUSTAD, HOW TO INTERVIEW (4th ed. 1959); R. FEAR, THE EVALUATION INTERVIEW (2d ed. 1973); J. MATARAZZO & A. WEINS, THE INTERVIEW: RESEARCH ON ITS ANATOMY AND STRUCTURE (1972); Arvey, *Unfair Discrimination in the Employment Interview: Legal and Psychological Aspects*, 86 PSYCHOLOGY BULL. 736 (1979); Dunnette & Borman, *Personnel Selection and Classification Systems*, 40 ANN. REV. PSYCHOLOGY 477 (1979); Grant & Bray, *Contributions of the Interview to Assessment of Management Personnel*, 53 J. APPLIED PSYCHOLOGY 24 (1969); Schmitt, *Social and Situational Determinants of Interview Decisions: Implications for the Employment Interview*, 29 PERSONNEL PSYCHOLOGY 79 (1976); Ulrich & Trumbo, *The Selection Interview Since 1949*, 63 PSYCHOLOGY BULL. 100 (1965).

Arvey & Campion, *The Employment Interview: A Summary and Review of Recent Research*, 35 PERSONNEL PSYCHOLOGY 281 (1982). These sources show that interviews can be created that are valid and nondiscriminatory if interview questions are carefully linked to job analysis and performance criterion data.[24]

Interview validity is not alone sufficient, however. The validity of the *interviewer* must also be established. An "interview requires skill in data gathering and in data interpreting. An interview may lead to wrong decisions because important data were not elicited or because given data were inadequately or incorrectly interpreted." Anastasi, *supra* note 14, at 610-611. In this regard, interviewer training is important. A structured interview guide will improve interviewer reliability and assist in removing any bias especially if the training occurs with applicants of gender and/or race different than that of the interviewer. With important interviews used to determine hiring or promotion, it is very helpful if applicants are seen by more than one interviewer, although if records are kept it is possible to identify those interviewers whose decisions are most reliable and valid and rely on those interviewers singly to make judgments. *See* Schneider & Schmitt, *supra* note 12, at 390-394; Hakel, *Employment Interviewing in* PERSONNEL MANAGEMENT (K. Rowland & G. Ferris eds. 1982).

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[24] As one example, researchers have described and tested an innovative but relatively simple and valid employment interview. Critical incidents, *i.e.*, reports by job incumbents or supervisors of situations in which especially effective or ineffective behavior is displayed, were converted into situational interview questions. The interviewer posed these situations to job applicants and asked them how they would behave. Each answer was rated independently by two or more interviewers on a five-point scale with end points on the scale provided by job experts to facilitate objective scoring. The process validily predicted future job performance for both women and blacks. *See* Latham, Saari, Pursell & Campion, *The Situational Interview*, 65 J. APPLIED PSYCHOLOGY 422 (1980).

In sum, the use of employment interviews should be "preceded by a thorough analysis of the target job, the development of a structured set of questions based on the job analysis, and the development of behaviorally specific rating instruments by which to evaluate applicants." Schneider & Schmitt, *supra* note 12, at 395. The assessment of employees "should be maximally dependent on their personal characteristics and minimally dependent on who made the assessment . . . . Where non-test predictors like interviewer judgments are used, the [employer] should develop procedures that will minimize error resulting from differences between judges." PRINCIPLES at 12.

2. *Rating scales and other performance appraisals.*

Performance appraisal devices such as rating scales are widely used in employment settings, and were used by respondent in this case.[25] "Rating scales differ from naturalistic observations in that data are accumulated casually and informally; they also involve interpretation and judgment, rather than simple recording of observations." Anastasi, *supra* note 14, at 611. In contrast to interviews, however, "they typically cover a longer observation period and the information is obtained under more realistic conditions." *Id.*

Like interviews, rating scales are subject to a variety of sources of contamination or bias, including: (1) *Opportunity bias* which occurs if raters do not have the opportunity to observe the employee in situations in which the behavior to be rated could be manifested, but have the opportunity to do so with a competing employee; (2) *halo effect*, a tendency on the part of raters to be unduly influenced by a single favorable or unfavorable

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[25] In one survey, 89% of the companies studied reported using performance appraisals on a regular basis. Locher & Teel, *Performance Appraisal—A Survey of Current Practices*, 56 PERSONNEL J. 245 (1977). Of all performance appraisal techniques, the rating scale is by far the most ubiquitous. *See* Landy & Farr, *Performance Rating*, 87 PSYCHOLOGICAL BULL. 72, 73 (1980) [hereinafter *Performance Rating*].

trait, which colors their judgment on the individual's other traits; (3) *error of central tendency*, or the tendency to place persons in the middle of the scale and to avoid extremes; and (4) *leniency error*, or the reluctance of many raters to assign unfavorable ratings. Both latter errors reduce the effective width of the rating scale and make them less useful in distinguishing among individuals. *See Anastasi*, *supra* note 14, at 611-612; Cronbach, *supra* note 14, at 509-511; Schneider & Schmitt, *supra* note 12, at 90-92; *Goldstein*, *supra* note 6, at 255.

Most troubling in the context of this case is that scores on rating scales may be affected by the race of the rater and ratee. White raters have been found to assign significantly higher ratings to white ratees than black ratees. These findings were noted in a comprehensive review of 74 studies involving 17,159 ratees in which the rater was white and 14 studies involving 2,420 ratees in which the rater was black. Race effects were more pronounced in real-life settings than in laboratory settings and more likely when, as in this case, the proportion of blacks in the workforce was small. *See* Kraiger & Ford, *A Meta-analysis of Ratee Race Effects in Performance Ratings*, 69 J. APPLIED PSYCHOLOGY 56 (1985).[26]

Psychologists have published a great deal of accessible literature describing rating scale formats which are useful in rating employees and have been critiqued in the

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[26] These findings are not universal nor do they imply that performance appraisal systems are inherently discriminatory. One study, for example, found no race of rater effect in an industrial setting which was highly racially integrated and where participants in the study had been exposed to human relations training. *See* Schmidt & Johnson, *Effect of Race on Peer Ratings in an Industrial Setting*, 57 J. APPLIED PSYCHOLOGY 237 (1973). These mitigating factors are not true with regard to respondent. For a comprehensive review of the effects of rater and ratee characteristics and the interaction of the two *see Performance Rating*, *supra* note 25, at 74-82.

context of Title VII requirements.[27] Many of these formats would be significant improvements over the system used by respondent.[28] Regardless of format, what does produce a superior scale is that it is the "result of psychometric rigor in development and of some level of participation of individuals representative of those who will eventually use the scales to make ratings . . . ." *Performance Rating*, *supra* note 25, at 85.

An essential aspect of the requirement for psychometric rigor is the job analysis. "The development of rating procedures should ordinarily be guided by job analyses

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[27] *E.g.*, Cascio & Bernardin, *Implications of Performance Appraisal Litigation for Personnel Decisions*, 34 PERSONNEL PSYCHOLOGY 211 (1981); Distefano, Pryer, & Erffmeyer, *Application of Content Validity Methods to the Development of a Job-Related Performance Rating Criterion*, 36 PERSONNEL PSYCHOLOGY 621 (1983); Feild & Holley, *The Relationship of Performance Appraisal System Characteristics to Verdicts in Select Employment Discrimination Cases*, 25 ACAD. MGMT J. 392 (1982); Kleiman & Durham, *supra* note 5; *Performance Rating*, *supra* note 25. The dissemination of this information is so widespread that it now appears in popular literature designed for lay readers. *See* Rice, *Spotlight on Employee Performance*, 9 US AIR 53 (August 1987).

[28] Two of the most popular rating formats are the graphic rating scale and the behaviorally anchored rating scale ("BARS"). In the graphic rating scale's most usual format, several dimensions to be rated are listed vertically and raters are then asked to make rating decisions along a horizontal 5 to 9 point scale. For example, if the dimension to be rated is "accuracy," the scale may use a numerical or one-word verbal rating, *e.g.*, 1 to 5 or "high" to "low"; preferably, it may use a range of descriptions, *e.g.*, at one end of the scale, would be "makes too many errors"; at the other end, "almost never makes mistakes." BARS uses dimensions derived by raters who would actually use the scale with different points on each dimension anchored by statements describing actual job behavior which would illustrate specific levels of performance, *e.g.*, using "accuracy" in rating a bank teller, the statements could include a range from "makes frequent errors in totalling accounts at end of day" to "errors in totalling accounts are consistently rare." *See generally* Schneider & Schmitt, *supra* note 12, at 101-106. Neither scale format seems more useful than the other in practice. *See Performance Rating*, *supra* note 25, at 85.

if, for example, raters are expected to evaluate several different aspects of performance," as in this case. PRINCIPLES at 10. Job analyses are also important if, as here, appraisal of past performance is used as a predictor of future performance. The use of ratings of past performance in one job to make promotion decisions for another position is only permissible if the ratings of past performance are valid and the ratings of past performance are related to future performance. The latter requires a job analysis indicating the extent to which the two jobs overlap. *See* Cascio & Bernardin, *Implications of Performance Appraisal Litigation for Personnel Decisions*, 34 PERSONNEL PSYCHOLOGY 211, 217 (1981).[29]

The usefulness of a rating scale is also highly dependent on the skill of the rater. "Valid ratings cannot be made by someone who is either unfamiliar with the work of the ratee or lacks the skills necessary to accurately observe or rate the job behavior." Kleiman & Durham, *supra* note 5, at 113. In these respects, "those in immediate contact with the subject give superior information," Cronbach, *supra* note 14, at 512 (in the case of employment settings, first level supervisors), and those raters who have undergone training show increased "reliability and validity of ratings" and decreased errors in judgment. Anastasi, *supra* note 14, at 612.[30]

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[29] *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431-433 (1975) where this Court, invoking the Uniform Guidelines (and crediting APA's STANDARDS) condemned as "materially defective" the employer's validation study because its "subjective supervisorial rankings" used standards which were vague and ambiguous and failed to follow the Uniform Guidelines' requirement for job analyses.

[30] *See also* Standard 1.13, STANDARDS at 16: "When criteria are composed of rater judgments, the degree of knowledge that raters have concerning ratee performance should be reported. If possible, the training and experience of the raters should be described"; PRINCIPLES at 10: "It may . . . be necessary to train raters in the observation and evaluation of performance. Further, supervisors should be expected to be familiar enough with the demands of the job to evaluate overall performance." The utility of rater training

In sum, rating scales will conform to legal and psychometric requirements if the appraisal system is based on a job analysis, contains clearly defined dimensions of job performance rather than vague, global measures or abstract trait names, is behaviorally based so that all ratings can be supported by objective, observable evidence, and if the raters are in the position to observe the behaviors to be rated and are trained to reduce sources of bias, contamination, or other rating errors.

3. *Experience requirements.*

The use of past experience to make judgments about future performance, as in this case, is one aspect of a recognized selection device called biographical inventory technique or, more commonly, "biodata." *See* Owens, *Background Data in* HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY (M. Dunnette ed. 1976). When used properly, biographical inventories which include prior experience are "especially appropriate for assessing the qualifications of women and minority groups." Anastasi, *supra* note 14, at 616. To serve this purpose, however, the biodata inventory must focus on "specific, job-relevant past achievements, rather than on the passive exposure implied by the customary education and experience records." *Id.* Respondent's use of an experience criterion falls far short of this standard.

In fact, use of biodata is relatively likely to produce adverse impact if biodata items are not chosen carefully. *See* G. DREHER & P. SACKETT, PERSPECTIVES ON STAFFING AND SELECTION (1983). A number of comprehensive

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in reducing rating errors and minimizing bias, as well as providing employers with useful techniques for doing so, is demonstrated in, *e.g.*, Bernardin & Pence, *Effects of Rater Training*, 65 J. APPLIED PSYCHOLOGY 60 (1980); Borman, *Format and Training Effects on Rating Accuracy and Rating Errors*, 64 J. APPLIED PSYCHOLOGY 410 (1979); Ivancevich, *Longitudinal Study of the Effects of Rater Training on Psychometric Errors in Ratings*, 64 J. APPLIED PSYCHOLOGY 502 (1979); Latham, Wexley & Pursell, *Training Managers to Minimize Rating Errors in the Observation of Behavior*, 60 J. APPLIED PSYCHOLOGY 550 (1975). *See generally* Goldstein, *supra* note 6, at 254-259.

validity studies have been conducted on the use of biodata as a selection device, concluding that it has inconsistent validity even in a form more comprehensive than used by respondent. *See, e.g.*, Reilly & Chao, *Validity and Fairness of Some Alternative Employee Selection Procedures*, 35 PERSONNEL PSYCHOLOGY 1 (1982).[31]

However, as with all selection devices, the most reasonable and justifiable approach in using biodata is to base the choice of items on a well done job analysis, matching the items to the knowledge, skill, and ability requirements of the job description. *See* Pace & Schoenfeldt, *Legal Concerns in the Use of Weighted Applications*, 30 PERSONNEL PSYCHOLOGY, 159 (1977). Past experience alone, without the careful selection of both logically and empirically justified life-history questions, is unacceptable as a selection device.[32]

II. THE SUBJECTIVE SELECTION PROCEDURES USED BY RESPONDENT FAIL TO MEET GENERALLY ACCEPTED STANDARDS AND APPEAR TO HAVE BEEN APPLIED WITHOUT ANY EVIDENCE THAT THEY ARE VALID FOR THE INFERENCES DRAWN FROM THEM.

When reviewed in the context of the principles and studies described in Part I, it is clear that the assessment

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[31] *Compare* Reilly & Chao, *Validity and Fairness of Some Alternative Employee Selection Procedures*, 35 PERSONNEL PSYCHOLOGY 1 (1982) (satisfactory reliability) with Korman, *The Prediction of Managerial Performance: A Review*, 21 PERSONNEL PSYCHOLOGY 295 (1968) (finding biodata to have lower validity than other predictors for predicting managerial performance).

[32] Sophisticated research on the use of valid biodata is available to inform the interested employer. *See, e.g.*, Brush & Owens, *Implementation and Evaluation for an Assessment Classification Model for Manpower Utilization*, 32 PERSONNEL PSYCHOLOGY 369 (1979); Schoenfeldt, *Utilization of Manpower: Development and Evaluation of Assessment-Classification Model for Matching Individuals with Jobs*, 59 J. APPLIED PSYCHOLOGY 583 (1974); Owens & Schoenfeldt, *Toward a Classification of Persons*, 46 J. APPLIED PSYCHOLOGY 329 (1979). *See generally* Schneider & Schmitt, *supra* note 12, at 378-382.

devices used by respondent in this case to select employees, including petitioner, for promotion to the position of teller supervisor are distressingly inadequate. They have been used to deny promotion to a member of a protected class without any evidence that they were developed, used, and applied in a way consistent with generally accepted professional standards. There is absolutely no evidence that the procedures were subjected to any of the validation strategies available to respondent, even in rudimentary form.

It is not unlawful *per se* for employers to use so-called "subjective" selection procedures. *See* Part I(A). But, assuming that the use of subjective criteria was appropriate for the position of supervisor of tellers, respondent failed to perform a job analysis for the position to identify more accurately the knowledges, skills, and abilities which are desirable for successful performance of the job.[33] There is no evidence that respondent secured accurate and thorough information about the job from job incumbents, their supervisors, personnel specialists, training manuals, job descriptions, or actual observation by trained observers. *See* PRINCIPLES at 5-6, 19-24; Schneider & Schmitt, *supra* note 12, at 47-50.

With regard to the selection procedures themselves, there are crucial infirmities in each of them. With regard to the *interview*, there is no evidence that the interviewer, in this case a white male, had any training in conducting interviews, a requirement that is especially important when the interviewee is of a different race and gender than the interviewer.[34] Nor was more than one

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[33] As noted in Part I, job analysis is a critical first step in establishing the usefulness of any selection procedure. For a review of 26 employment discrimination cases yielding a helpful summary of requirements for judicially-approved job analyses, *see* Thompson & Thompson, *Court Standards for Job Analysis in Test Validation*, 35 PERSONNEL PSYCHOLOGY 865 (1982).

[34] "The training of interviewers especially with possible applicants of different race or sex may increase 'their ability to relate' . . . ." Schneider & Schmitt, *supra* note 12, at 386; *see* Schmitt, *Social and Situational Determinants of Interview Decisions: Impli-*

interviewer systematically involved in decisionmaking. There is also no evidence that the interviews were structured so as to improve reliability and reduce biasing errors,[35] nor is there any evidence that the nature of the interview or the questions asked had any empirical, logical, or theoretical connection with the position for which petitioner was considered.[36]

With regard to the *rating scales*, it was especially important for respondent to have offered some evidence for the validity of its supervisor performance appraisal, as the use of numerical values gives it facial validity and the appearance of objectivity. But, when judged according to the criteria discussed in Part I(B) & (C)(2) the rating scale is deplorable.

The qualities measured on the rating scale are neither unambiguously defined nor is there any demonstrable correlation between many of the criteria listed in the scale and successful job performance.[37] For example, all

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cations for the Employment Interview, 29 PERSONNEL PSYCHOLOGY 79, 97 (1976). *See also* PRINCIPLES at 33: "All persons within the organizations who have responsibilities related to the use of employment tests and related predictors should be qualified through appropriate training to carry out their responsibilities."

[35] "Use of a structured interview guide will improve interviewer reliability." Schneider & Schmitt, *supra* note 12, at 386.

[36] "Predictor variables should be chosen for which there is an empirical, logical, or theoretical foundation." PRINCIPLES at 11.

[37] The qualities rated were accuracy of work, alertness, personal appearance, supervisor-coworker relations, quantity of work, physical fitness, attendance, dependability, stability ("the ability to withstand pressure and remain calm in most situations"), drive ("ambition"), friendliness and courtesy, and job knowledge. The qualities were variously rated on a scale from 0 to 7-10. *See Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 812 n.26 (5th Cir. 1986) (Goldberg, J., dissenting). "Few of these categories have much objective content. For example, 'personal appearance,' 'drive,' and 'friendliness and courtesy' are clearly subjective on their face. . . . The rating system is also subjective: [e.g.,] 0-1 'does not meet minimum requirement . . .; 7-8, 'superior work production record.' This type of subjective measurement lends itself to discriminatory bias, be it conscious or unconscious." *Id.*

but two of the rating criteria used by respondent are totally undefined and the two that have purported definitions (stability and drive) are only vaguely defined; none of qualities assessed have anchoring or endpoint definitions, as is customary in generally accepted graphic or BARS scales.[38] The scale thus failed to use clearly defined individual components or dimensions of job performance, in contrast to undefined global measures, *e.g.*, "neat and clean in appearance" vs. "personal appearance." [39] Similarly, it did not use behaviorally based performance dimensions that could be verified by objective, observable evidence, *e.g.*, "knows how to check account balance vs. "job knowledge." [40]

The failure to conduct even a rudimentary job analysis further undermines the rating scale's validity. It is far from clear how criteria such as "physical fitness," measure an individual's ability to supervise tellers. The constructs or behavior traits identified by respondent such as "drive" or "dependability" could be validated for use in promoting individuals to supervisory teller positions if demonstrated to be job-related and assessed reliably from the performance appraisal. Although the use of such "abstract trait names" is not advised unless the traits can be defined in terms of observable behaviors,[41] it may be necessary to measure such personality constructs for certain jobs. If certain traits or constructs are deemed important enough to influence personnel selection, however, they are important enough to measure validly:

> Knowing whether a construct is measured validly requires, if not a theory, at least some fairly well articulated ideas about what is being measured, what a

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[38] *See supra* note 28.

[39] Cascio & Bernardin, *Implications of Performance Appraisal Litigation for Personnel Decisions*, 34 PERSONNEL PSYCHOLOGY 211, 212 (1981) [hereinafter Cascio & Bernardin].

[40] *Id.*

[41] Cascio & Bernardin, *supra* note 39, at 212.

> measure of the construct should reasonably be expected to be related to and, perhaps more importantly, what it should not be related to. . . . This view of constructs and construct validity implies two aspects of a construct-related strategy for developing evidence to judge the job relatedness of a selection procedure. The first is evidence that the construct is indeed important for job performance. . . . Ordinarily, a job analysis can provide a part of the basis for identifying and defining constructs which are important to job performance. Clarity of the articulation of the meaning and the nature of the construct, and well-informed expert judgment that a logical relationship exists between the nature of the construct and identifiable demands of the job is essential.
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> The second is evidence that the instrument used as a selection procedure is a valid measure of the construct and not of other constructs.

PRINCIPLES at 25; *see also* STANDARDS 9-10.

Finally, there is no indication that the supervisors who performed the ratings had any training in assessing responses, avoiding the variety of sources of contamination of bias, especially when there is significant evidence that scores on rating scales may be affected by the race of rater and ratee. *See* Part I(C)(2).

With regard to *experience requirements*, respondent failed to show that the lack of prior experience upon which it based its failure to promote petitioner in her first three attempts was related to the position for which she applied. It could very well be that her experience as a teller would be predictive of her success as a supervisor of tellers, but without an analysis of both positions, that assumption could very well be faulty. In addition, respondent idiosyncratically employed the criterion, using her alleged lack of experience to justify its denying her promotion in three instances and then ignored the criterion to deny her promotion in a fourth instance, when it promoted a competing applicant with less experience. Perhaps most importantly, respondent failed to use prior

experience as one part of a carefully selected and logically and empirically justified comprehensive biographical data inventory.

Although respondent may have fewer resources to devote to assessment device development or validation than larger organizations, that fact does not excuse the absence of any attempt to support its use of the selection devices employed in this case:

> Where resources or sample sizes are limited, the criterion-related evidence of validity and content-related validation judgments obtained on similar jobs in other settings and the strength of the construct-related evidence of validity already generated by the [particular instrument] become particularly important. Employers should not be precluded from using a [particular instrument] if it can be demonstrated that th[at instrument] has generated a significant record of validity in similar job settings for highly similar people[,] or that it is otherwise appropriate to generalize from other applications.

STANDARDS at 59.[42] Respondent neglected to conduct even this inexpensive inquiry. There is absolutely no legitimate reason why respondent failed to conduct even crude validity studies of the selection devices it used to evaluate petitioner or, at the very least, to investigate the availability of existing sources of valid selection devices. These failures are all the more disturbing considering its poor record in hiring and promoting minority employees.[43]

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[42] Researchers and employers are encouraged to conduct cooperative studies when adequate data . . . are not available." PRINCIPLES at: The Uniform Guidelines also clearly permit exceptions to the general requirement that employers validate their own procedures. *See* 29 C.F.R. §§ 1607.6-.8.

[43] "[P]laintiff presented 'significant proof' that the bank operated under a 'general policy of discrimination'." *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 807 (5th Cir. 1986) (Goldberg, J., dissenting). *See, id.* at 810-814 for supporting statistical data.

III. THE FAILURE TO REQUIRE THAT SUBJECTIVE SELECTION DEVICES HAVE DEMONSTRABLE VALIDITY WOULD UNDERMINE THE PURPOSES OF TITLE VII.

The underlying goal of Title VII of the Civil Rights Act of 1964 was the "eliminat[ion] . . . [of] discrimination in employment" based on race, color, religion, sex or national origin in all of its forms. H.R. Rep. No. 914, 88 Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 2391, 2401. Consistent with that goal, Title VII prohibits employers from discriminating in employment decisions based on such impermissible classifications. *See* 42 U.S.C. § 2000e-2. However, because "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of his qualifications," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), it authorized employers to distinguish among individuals for selection or promotion purposes based "upon the results of any professionally developed ability test provided that such tests, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. 2000e-2(h).[44]

In permitting the appropriate use of "professionally developed ability tests" as a basis for selecting and promoting individuals, the drafters of the ultimate language of Title VII stressed the importance of demonstrating the relationship and relevance of the selection procedure to job qualifications. *See* 110 *Cong. Rec.* 7247 (1964). Recognizing the "u[tility]" of "testing or measuring procedures," this Court has also stressed Congress' intent to "forbid[] . . . giving these devices and mechanisms

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[44] "[T]he Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group . . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible factors." *Griggs*, 401 U.S. at 431.

controlling force unless they are demonstrably a reasonable measure of job performance." *Griggs*, 401 U.S. at 436. "What Congress . . . commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.*

Proponents of Title VII opposed authorizing the use of "professionally developed ability tests" without regard to their ability to predict performance of the particular job in question. 110 *Cong. Rec.* at 13504. The use of tests which, although "professionally developed" bear no relation to the job for which they are being used to assess individuals, was clearly recognized as a potential means of covert "[d]iscrimination[,] . . . under the guise of compliance with the statute." *Id.* Assessment devices which have not been shown to be job-related, or otherwise predictive of performance of a particular job, cannot justify discriminatory employment practices. The crucial public policy goals of Title VII would be thwarted if employers could rebut claims of discrimination simply by pointing to the results of unvalidated assessment devices, whether subjective or objective. Indeed, such unvalidated results may well reflect precisely the discrimination Congress sought to eliminate in Title VII.

In light of the "nondiscrimination" objectives of Title VII and the demonstrated ability of professionals to validate subjective assessment devices, however, there is no principled reason to treat objective and subjective devices differently in imposing a validation requirement, regardless of whether a plaintiff proceeds under disparate impact or disparate treatment claim.[45] Indeed, permitting the use of unvalidated subjective assessment devices while requiring objective devices to be validated provides a ready mechanism for covert discrimination for employers seeking to avoid the constraints of Title VII. Validation does require the expenditure of both time and money by an employer. But, as *amicus* has demonstrated,

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[45] *Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

there are a number of readily available techniques for developing, adopting, and validating both objective and subjective devices, and both professional and legal standards allow the use of already developed selection devices. Thus, when one balances the relative costs of validation to the employer against the costs of eroding the protections provided by Title VII and the damage to society of perpetuating the vestiges of discrimination, the outcome clearly favors the requirement that employers use pyschometrically sound and job-relevant selection devices.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court reverse the decision of the Court of Appeals for the Fifth Circuit insofar as it releases employers from their obligation to show that the selection devices they use to make employment decisions are valid.

Respectfully submitted,

DONALD N. BERSOFF
(Counsel of Record)
LAUREL PYKE MALSON
DONALD B. VERRILLI, JR.
ENNIS FRIEDMAN & BERSOFF
1200 - 17th Street, N.W., Suite 400
Washington, D.C. 20036
(202) 775-8100
Attorneys for Amicus Curiae
American Psychological Association

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In The
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CLARA WATSON,
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v.

FORT WORTH BANK & TRUST,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE EMPLOYMENT LAW CENTER, AND THE CENTER FOR LAW IN THE PUBLIC INTEREST AS AMICI CURIAE

JULIUS LeVONNE CHAMBERS
RONALD L. ELLIS
CHARLES STEPHEN RALSTON
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street
New York, N.Y. 10013
212/219-1900

BILL LANN LEE*
STEPHEN M. CUTLER
Center for Law in the Public Interest
10951 W. Pico Blvd., 3d Floor
Los Angeles, CA 90064
213/470-3000

ANTONIA HERNANDEZ
E. RICHARD LARSON
JOSE ROBERTO JUAREZ
Mexican American Legal Defense and Educational Fund
634 S. Spring Street
Los Angeles, CA 90014
213/629-2512

JOAN M. GRAFF
PATRICIA A. SHIU
Employment Law Center
1663 Mission St., Suite 400
San Francisco, CA 94103
415/864-6648

Counsel for Amici

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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INTEREST OF AMICI CURIAE

Amicus NAACP Legal Defense and Educational Fund, Inc. is a New York nonprofit organization that has litigated numerous cases on behalf of black persons seeking vindication of their civil rights, including *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Amicus Mexican American Legal Defense and Educational Fund, headquartered in Los Angeles, is a national civil rights organization that has brought various lawsuits on behalf of Latinos subject to discrimination in employment, public education, voting rights and other areas of public life. Amicus Employment Law Center, a project of the Legal Aid Society of San Francisco, has represented women and minorities in nu-

merous employment discrimination cases, including *California Federal Savings and Loan Association v. Guerra*, — U.S. —, 107 S.Ct. 683 (1987). Amicus Center for Law in the Public Interest is a non-profit corporation located in Los Angeles that for many years has prosecuted civil rights and public interest lawsuits, including employment discrimination class actions on behalf of women and minorities. Letters from the parties consenting to the filing of this brief have been filed with the Court.

INTRODUCTION

The Court granted certiorari to consider whether an employer's selection or promotion practices may be insulated from disparate impact scrutiny under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982 ed. & Supp. III), simply because they are subjective. Amici will address the merits of the issue so as to respond to the arguments made by the United States in its amicus curiae brief supporting the petition for certiorari.

Preliminarily, however, we have grave doubts that this important legal issue is properly presented by the case now before the Court. The record reflects that the petitioner relied upon disparate treatment analysis in the trial court, and could not prove a case of denial of promotions based on disparate impact.[1] Even if this Court were to

[1]The evidence presented at trial was typical of a disparate treatment case. Petitioner testified as to her qualifications and the fact that she had applied for three promotions; the defendant presented evidence that purported to establish legitimate, non-discriminatory reasons for each promotion action. Those reasons focused on the relative qualifications of the persons selected and the legitimacy of the employer's actions. Evidence was also presented showing a low hire rate and slower promotion rate for blacks.

The district court found—and those findings are not challenged here—that throughout the relevant time period, the respondent employed a total of only 15 blacks, and that at any one time, the number of blacks employed never exceeded eight.

(Continued on following page)

hold that disparate impact analysis should be applied to subjective employment practices, as we urge below, the petitioner would be unable to establish a violation of Title VII on that basis. Accordingly, it is appropriate to dismiss certiorari as improvidently granted.

Should the Court reach the merits in this—or another—case, amici urge the Court to reject the government's proposed exemption for subjective employment practices.[2]

(Continued from previous page)

The particular complaint of the plaintiff is that she was discriminatorily denied promotions on three occasions. The district court further found that, in addition to plaintiff, only one other black had applied for promotions given to whites. Thus, blacks applied for and were denied a total of five promotions. Memorandum Opinion of District Court at 13 (Nov. 21, 1984); Testimony of Sylvia Harden, Tr. Vol. III, at 98-99. Such numbers do not permit a showing of disparate impact, since they cannot establish any pattern of the effect of an employment practice. The government agrees. *See* Brief for the United States as Amicus Curiae, at 20 n.16.

[2]The line between subjective and objective employment practices is not as bright as the government suggests.

> [A]lmost all criteria necessarily have both subjective and objective elements. For example, while the requirement of a certain test score may appear "objective," the choice of skills to be tested and of the testing instruments to measure them involves "subjective" elements of judgment. Such apparently "subjective" requirements as attractive appearance in fact include "objective" factors. Thus the terms represent extremes on a continuum . . . .

Atonio v. Wards Cove Packing Co., 810 F.2d 1477, 1485 (9th Cir. 1987) (*en banc*). In the words of one commentator, "[m]ost employment decisions contain some element of subjectivity." Comment, Applying Disparate Impact Theory to Subjective Employee Selection Procedures, 20 *Loy. L.A.L. Rev.* 375, 400 (1987). *See also* Lamber, Discretionary Decisionmaking: The Application of Title VII's Disparate Impact Theory, 1985 *U. Ill. L. Rev.* 869, 874 n.14 ("In a sense, all decisions—from the pure hunch to the choice of using a clearly defined objective rule—involve discretion."). *Cf. Nation v. Winn-Dixie Stores, Inc.*, 567 F.Supp. 997, 1005 n.20 (N.D. Ga.) ("[I]t is especially difficult in the context of promotions to formulate employer decisionmaking criteria that are completely free of subjectivity."), *aff'd on reh'g*, 570 F.Supp. 1473 (N.D. Ga. 1983).

Such an exemption is directly contrary to Title VII's plain meaning, the prior decisions of this Court, specific legislative history, the Justice Department's own guidelines on employee selection, and the prophylactic purpose of the statute.

The government would permit an employer to make personnel decisions on the basis of "subjective" criteria—even if those criteria are "unrelated to measuring job capability," *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971), and result in the disproportionate exclusion of minorities and/or women—so long as those decisions are made in good faith. The alternative, it is argued, would be to interfere with the employer's management prerogatives. *See* Brief for the United States as Amicus Curiae at 14-17. Yet management prerogatives are necessarily circumscribed by Title VII's essential purpose of "achiev[ing] equality of employment opportunit[y]." *Griggs*, 401 U.S. at 429. They cannot be permitted to shield discrimination, "subtle or otherwise." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). Accordingly, this Court has consistently rejected arguments founded on the notion of employer discretion where that discretion would be exercised in a manner contrary to Title VII's prohibitory pronouncements. In *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984), for example, the Court held that Title VII applied to the partnership decisions of a law firm, notwithstanding the possible infringement on that firm's rights of expression and association. *Cf. id.* at 80 n.4 (Powell, J., concurring) ("[L]aws that ban discrimination . . . may impede the exercise of personal judgment . . . . "). And last term, the Court rejected government arguments based on policy considerations relating to the prerogatives of unions. *Goodman v. Lukens Steel Co.*, — U.S. —, —, 107 S.Ct. 2617, 2624-25 (1987).[3] Whether or not such prerogatives are diminished by the application of disparate

[3]See Brief for the United States as Amicus Curiae at 19-24, *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987).

impact analysis to subjective employment practices, "Congress has made the choice, and it is not for us to disturb it." *Chandler v. Roudebush*, 425 U.S. 840, 864 (1976) (rejecting government's proffered interpretation of Title VII in face of plain meaning of statute and its legislative history).

SUMMARY OF ARGUMENT

"A disparate-impact claim reflects the language of § 703(a)(2)," *Connecticut v. Teal*, 457 U.S. 440, 448 (1982). The plain terms of the statute provide absolutely no basis for exempting the entire category of subjective employment practices from the scope of § 703(a)(2). Had Congress intended to exempt subjective criteria, it well knew how to do so. *See Hishon v. King & Spalding*, 467 U.S. 69, 77-78 (1984) ("When Congress wanted to grant an employer . . . immunity, it expressly did so.").

The legislative history of the 1972 amendments to Title VII demonstrates that Congress ratified and endorsed the Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and contemplated its application to all employment practices, including subjective criteria, having a discriminatory impact on minorities and women. In particular, Congress specifically indicated, with respect to the federal government's personnel system, that *Griggs* applied to its subjective selection criteria. The administrative regulations issued by the agencies charged with enforcement responsibility confirm that Congress intended the disparate impact analysis to apply to "the full range of assessment techniques from traditional paper and pencil tests . . . through informal or casual interviews and unscored application forms." 29 C.F.R. § 1607.16Q (1986).

Limiting § 703(a)(2) disparate impact analysis to objective criteria would frustrate Title VII's primary goal of "achiev[ing] equality of employment opportunities." *Griggs*, 401 U.S. at 429. Moreover, the exclusion of subjective practices from disparate impact analysis would

make employers less inclined to "'self-examine and self-evaluate [their] employment practices,'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (quoting *United States v. N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)), as contemplated by Title VII.

ARGUMENT

The government would exempt from disparate impact analysis all practices and procedures of a subjective nature —*i.e.*, discretionary selection devices such as evaluative interviews, performance appraisals, and essay examinations. Application of the disparate impact analysis would be limited to objective criteria—*i.e.*, non-discretionary selection devices such as height and weight requirements, *see Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977), mechanically scored intelligence tests, *Griggs v. Duke Power Co.*, 401 U.S. 424, 427-28 (1971), and diploma requirements, *id.*[4] Accordingly, the government would make intent the sole focus of most Title VII litigation. *See supra* note 2. But just like their non-discretionary counterparts, discretionary selection criteria can "operate as 'built-in headwinds' for minority groups [and women]," *Griggs*, 401 U.S. at 432, even in the absence of discriminatory intent. *See infra* at 24-25.[5] Whether an employment practice is objective or subjective should not and cannot "provide a line

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[4]*Cf.* W. Cascio, *Applied Psychology in Personnel Management* 129 (2d ed. 1982) ("The method of scoring a test may be objective or non-objective. In the former case, there are fixed, impersonal standards for scoring . . . . On the other hand, the process of scoring essay tests and certain types of personality inventories . . . may be quite subjective . . . ."); D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 1.23 (1980 & 1986 Supp.) (distinguishing between "nondiscretionary criteria" and criteria that are "discretionarily . . . applied"). *But see supra* note 2.

[5]Under the government's proposed exemption for subjective criteria, a non-discretionary requirement of supervisory experience might be shielded simply by taking that experience into account through a discretionary requirement of "leadership" ability. *See infra* at 26.

of demarcation to guide courts in choosing the appropriate analytic tool in a Title VII discrimination case." *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (9th Cir. 1987) (*en banc*).

I. THE LANGUAGE OF TITLE VII SUPPORTS THE APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE CRITERIA

As the Court noted in *Connecticut v. Teal*, 457 U.S. 440, 448 (1982): "A disparate-impact claim reflects the language of § 703(a)(2)." Nothing in the statute can be read to exclude subjective employment practices from that section's reach.

A. Section 703(a)(2) Is a Crucial Element of Title VII's Comprehensive Enforcement Scheme

The two subparts of § 703(a) reflect the intent of Congress to proscribe "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S. at 431.

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). Section 703(a)(2) is concerned with "the *consequences* of employment practices," *Griggs*, 401 U.S. at 432 (emphasis in original), for which disparate impact analysis is appropriate.

The § 703(a) enforcement scheme evidences no intent to restrict a plaintiff to subpart (1) as an exclusive remedy

for any category of employment practices. Section 703(a) is a comprehensive framework, embracing all forms of employment discrimination by providing overlapping guarantees against both the overt discrimination to which § 703 (a)(1) is primarily directed,[6] as well as the denial of equal employment "opportunities" with which § 703(a)(2) is concerned, *Teal*, 457 U.S. at 449; *Griggs*, 402 U.S. at 431.

B. Section 703(a)(2) Draws No Distinctions Among Different Employment Practices

Section 703(a)(2), by its terms, prohibits practices that "limit, segregate, or classify . . . employees or applicants . . . *in any way*" so as to deprive an individual of employment opportunities on the basis of race, sex, or some other protected characteristic. 42 U.S.C. § 2000e-2 (a)(2) (emphasis added). It nowhere suggests that subjective practices should be exempted, and indeed, draws no distinction between objective and subjective employment criteria. Accordingly, the government's attempt to draw such a distinction should be rejected: "'[T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.'" *Chandler v. Roudebush*, 425 U.S. at 848 (quoting *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925)). The most natural reading of § 703(a)(2) is that all employment practices are covered by its broad prohibition and may come under disparate impact scrutiny. As this

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[6] A violation of § 703(a)(1) may also be established by showing that a practice is facially discriminatory. *See City of Los Angeles v. Manhart*, 435 U.S. 702 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). Several lower courts have held that disparate impact challenges may also be brought under § 703(a)(1). *See, e.g., Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1127 (7th Cir. 1987); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984); *cf. Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977) (The Court "need not decide whether . . . it is necessary to prove intent to establish a prima facie violation of § 703(a)(1).").

Court noted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) (emphasis added): "Congress intended to prohibit *all* practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."

C. The Asserted Exemption From § 703(a)(2) Is Found Nowhere in the Language of Title VII, and Must Be Rejected

The government would exempt a whole category of employment practices from § 703(a)(2)'s coverage, though no such exemption appears in the language of that section or the other provisions of Title VII. That absence of textual support is telling: "When Congress wanted to grant an . . . immunity, it expressly did so." *Hishon v. King & Spalding*, 467 U.S. 69, 77-78 (1984) (rejecting assertion of immunity for partnership decisions); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) ("Were it not for § 703(h), the seniority system in this case would seem to fall under the *Griggs* rationale.").

For example, Congress specifically exempted the use of bona fide occupational qualifications based on religion, sex or national origin, § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1), *see Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971); bona fide seniority or merit systems, § 703(h), 42 U.S.C. § 2000e-2(h), *see Teamsters*, 431 U.S. at 350-56 (exemption applying to § 703(a)(2) cases only); ability tests "not designed, intended or used to discriminate," § 703(h), 42 U.S.C. § 2000e-2(h), *see Griggs*, 401 U.S. at 433-36; and certain preferential treatment of Indians, § 703(i), 42 U.S.C. § 2000e-2(i), *see Morton v. Mancari*, 417 U.S. 535, 545 (1974). Congress also provided express exemptions for the employment practices of Indian tribes and certain agencies of the District of Columbia, § 701(b)(1), 42 U.S.C. § 2000e(b)(1); small businesses and bona fide private membership clubs, § 701(b)(2), 42 U.S.C. § 2000e(b)(2); certain religious organizations, § 702, 42 U.S.C. § 2000e-1; and certain religious educational institutions, § 703(e)(2), 42 U.S.C. § 2000e-2(e)(2).

Here, the government would have this Court *create*—where Congress did not—a § 703(a)(2) exemption for subjective employment practices and exclude them from disparate impact scrutiny. Because that asserted exemption falls outside the express language of Title VII, however, it must be rejected. *See Hishon*, 467 U.S. at 77-78.

II. THE COURT'S DECISIONS SUPPORT APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE CRITERIA

This Court's decisions are consistent with the above-proffered construction of § 703(a)(2). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 432-33 (1975), the Court acknowledged difficulty in determining whether subjective appraisals, executed as part of a validation study, had measured job-related ability. The same concern exists when such appraisals constitute the employment practice being challenged. Implicit in the Court's opinion is the recognition that, notwithstanding a lack of discriminatory intent, minorities and women might be adversely affected by discretionary practices that do not closely relate to job capability.

While the Court has not specifically discussed the application of disparate impact analysis to subjective employment practices, it has never excluded any practice from the scope of § 703(a)(2).[7] Moreover, the Court has con-

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[7]Those practices "clearly fall[ing] within the literal language of § 703(a)(2)," *Teal*, 457 U.S. at 448, include written examinations, *Albemarle*, 422 U.S. at 425; *Griggs*, 401 U.S. at 433, educational requirements, *id.*, height and weight requirements, *Dothard*, 433 U.S. at 328-29, a policy against employing persons who use narcotic drugs, *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-87 (1979), and a residual category of practices that perpetuate the effects of prior discrimination, *Teamsters*, 431 U.S. at 349 ("One kind of practice 'fair in form, but discriminatory in operation' is that which perpetuates the effects of discrimination."). Of course, within such a residual category, one would expect to find subjective, as well as objective employment practices. *See Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir.) ("[e]lusive [and] purely subjective standards" may effectively perpetuate past discrimination), *cert. denied*, 409 U.S. 982 (1972).

sistently spoken in broad-brush terms such as "practices," "criteria," and "barriers"--terms that clearly encompass both subjective and objective practices—in discussing and applying the disparate impact theory.[8]

That subjective practices are susceptible to challenge under the disparate treatment analysis of § 703(a)(1) does not mean that they are *not* susceptible to challenge under the disparate impact analysis of § 703(a)(2). As the Court acknowledged in *Teamsters*, 431 U.S. at 335 n.15, "[e]ither theory may, of course, be applied to a particular set of facts." An objective selection criterion may be discriminatory either because its adoption is traceable to a discriminatory motive,[9] or because the practice has an unjustified discriminatory effect. The same is true for a subjective selection criterion. The government, without mentioning *Teamsters*, argues that this Court expressly de-

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[8]*See, e.g., Griggs*, 401 U.S. at 430 ("practices, procedures, or tests"); *id.* at 431 ("criteria for employment"); *id.* at 432 ("any given requirement"); *Dothard*, 433 U.S. at 328 ("arbitrary barrier to equal employment opportunity"); *Beazer*, 440 U.S. at 584 ("an employment practice has the effect of denying . . . equal access to employment opportunities"); *Teal*, 457 U.S. at 448 ("nonjob-related barrier"). *Cf. General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 159 n.15 (1982) ("Title VII prohibits discriminatory employment *practices*," including "subjective decisionmaking processes.") (emphasis in original).

[9]*See, e.g., United States v. Georgia Power Co.*, 695 F.2d 890, 893 (5th Cir. 1983) (non-discretionary seniority system "maintained out of an unlawful purpose"); *Sears v. Bennett*, 645 F.2d 1365, 1374 (10th Cir. 1981) (seniority system "maintained with the purpose of discriminating against black employees"), *cert. denied*, 456 U.S. 964 (1982); *Chicago Police Officer's Ass'n v. Stover*, 552 F.2d 918, 921-22 (10th Cir. 1977) (case remanded for determination of whether employment test having discriminatory impact was adopted with discriminatory intent); *cf. Wallace v. City of New Orleans*, 654 F.2d 1042, 1047 (5th Cir. 1981) (police department's adoption of height/weight requirement held not a product of intentional discrimination); *Hicks v. Crown Zellerbach Corp.*, 319 F.Supp. 314, 318 (E.D. La. 1970) ("There was no claim that defendants had adopted the tests for the express purpose of capitalizing on these differential passing rates . . . .").

clined to apply § 703(a)(2) to discretionary employment practices in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). *See* Brief for the United States as Amicus Curiae at 11-12. A close look at those cases, however, demonstrates otherwise.

In *McDonnell Douglas*, there was simply no assertion of disparate impact. The plaintiff's claims were limited to disparate treatment and retaliation under §§ 703(a)(1) and 704, *see* 411 U.S. at 796-98, 807; a § 703(a)(2) claim was never made. Indeed, the plaintiff made no effort to establish any group-wide effects of the practice at issue. *See id.* at 805. Thus, the case neither holds nor implies that § 703(a)(2) disparate impact analysis is inapplicable to subjective practices.

Nor does *Furnco* support such a contention.[10] The Court granted certiorari "to consider important questions raised by th[e] case regarding the exact scope of the prima facie case under [the] *McDonnell Douglas* [disparate treatment approach] and the nature of the evidence necessary to rebut such a case." *Id.* at 569. The Court agreed with the court of appeals that the plaintiff had made out a prima facie case of disparate treatment, but reversed on the issue of the defendant's burden of rebuttal. The government's assertion that the Court "expressly refused to apply disparate impact analysis," Brief for the United States as Amicus Curiae at 12, is incorrect: A disparate impact claim was not before the Court. While the Court

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[10] In *Furnco*, several black applicants for employment challenged, on both disparate impact and disparate treatment grounds, an employer's practice of hiring only those applicants who were known by the superintendent or who were otherwise recommended. The district court rejected both claims, finding, on the impact claim, that blacks as a group were not disproportionately excluded by the employer's selection process. 438 U.S. at 572. The court of appeals reversed on the disparate treatment claim, *id.* at 573-74, and the employer sought and petitioned for certiorari only on disparate treatment issues. *See id.* at 574 n.6 (questions presented in petition for certiorari).

noted that the selection procedure at issue in *Furnco* "did not involve employment tests which we[re] dealt with in *Griggs* . . . and in *Albemarle* . . ., or particularized requirements such as the height and weight specifications considered in *Dothard* . . .," *id.* at 575 n.7, it cannot be concluded that the Court intended this bare listing to announce a decisional rule restricting use of the disparate impact analysis to objective criteria.[11] Although the government fails to mention it, the Court also noted, in the same discussion, that *Furnco* "was not a . . . case like *Teamsters* . . .," *id.*, in which the employment practices at issue were discretionary in nature. *See Teamsters*, 431 U.S. at 338 n.19. There is, in short, nothing in *Griggs* or its progeny that would limit use of the disparate impact analysis to objective criteria.

III. LEGISLATIVE HISTORY SANCTIONS APPLICATION OF THE DISPARATE IMPACT ANALYSIS TO SUBJECTIVE PRACTICES

While "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII" in 1964, *Teamsters*, 431 U.S. at 335 n.15, "it was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,'

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[11] First, the complained-of practice in *Furnco* was itself nondiscretionary or objective in nature: The employer simply "refus[ed] to consider . . . applications at the gate." *Furnco*, 438 U.S. at 576 n.8. Second, while the employment practices in *Griggs*, *Albemarle*, and *Dothard* all might have been susceptible to disparate treatment analysis, in none of those cases would the *McDonnell Douglas* approach have been appropriate. To make out a prima facie case under *McDonnell Douglas*, the plaintiff must show "that he . . . was *qualified* for [the] job" at issue. 411 U.S. at 802 (emphasis added). However, the plaintiffs in *Griggs*, *Albemarle*, and *Dothard* brought suit because discriminatory selection criteria had rendered them *"un*qualified." Thus, perhaps the Court meant only to suggest that the case before it was (unlike *Griggs*, *Albemarle*, and *Dothard*) susceptible to the *McDonnell Douglas* approach, and not that the plaintiff was foreclosed from making a disparate impact challenge.

110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it is to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." *United Steelworkers v. Weber*, 443 U.S. 193, 203 (1979). By 1972, when it enacted several major amendments to Title VII, Congress fully understood that the opening of those opportunities could not be achieved by the eradication of just intentional discrimination. *See* S. Rep. No. 415, 92d Cong., 1st Sess. 14 (1971) [hereinafter "S. Rep. No. 415"] ("[W]here discrimination is institutional, rather than merely a matter of bad faith, . . . corrective measures appear to be urgently required."); *see also* 117 Cong. Rec. 32103 (Sept. 16, 1971) (remarks of Rep. Fraser) ("Often the source of discriminatory patterns is inertia rather than deliberate intent. But that does not lessen the injustice and economic damage done to the recipients.").

The 1972 amendments, among them a broadening of § 703(a)(2) to include "applicants for employment," *see* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 109, were the result of a thorough review by Congress of both the statute and the existing case law, including this Court's *Griggs* decision. Indeed, "[t]he legislative history . . . demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*," *Teal*, 457 U.S. at 447 n.8, and contemplated its application to all employment practices having a discriminatory effect.[12]

In extending to state and municipal employees the protections of Title VII—"as interpreted by *Griggs*," *id.*

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[12]This Court has relied upon the 1972 legislative history not only in *Teal*, 457 U.S. at 447 n.8, but also in *Franks*, 424 U.S. at 764 n.21, 796 n.18 (Powell, J., concurring in part and dissenting in part), *Albemarle*, 422 U.S. at 420-21, and *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975). *Compare Teamsters*, 431 U.S. at 354 n.39 (little, if any, weight given to 1972 legislative history in light of clear language of § 703(h), which was unaffected by 1972 amendments).

at 449—Congress was concerned with "*both* institutional and overt discriminatory practices," and specifically identified "stereotyped misconceptions by supervisors regarding minority group capabilities" as having perpetuated the effects of past discrimination. H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971) [hereinafter "H.R. Rep. No. 238"] (emphasis added); *see also* S. Rep. No. 415, at 10. Congress also relied upon a report authored by the United States Commission on Civil Rights, which specifically identified "supervisory ratings" as a "[b]arrier[] to equal opportunity." U.S. Commission on Civil Rights, For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment 119 (1969), *reprinted in* 118 Cong. Rec. 1817 (1972). *See Teal*, 457 U.S. at 449 n.10.

The extension of Title VII to federal employees was grounded in similar concerns about both subjective and objective practices. Quoting the presidential memorandum accompanying Executive Order 11478, both Committee reports declared that "discrimination of *any* kind based on factors not relevant to job performance must be eradicated completely from Federal employment." H.R. Rep. No. 238, at 22-23; S. Rep. 92-415, at 13 (emphasis added).[13]

Indeed, legislative history is particularly instructive with regard to the selection procedures of the federal government. At the Senate hearings, Rep. Fauntroy of the District of Columbia testified concerning the numerous complaints received from his constituents regarding discrimination by federal agencies. He was particularly critical of the Civil Service Commission's focus on attempting to find supervisors with malicious intent "rather than focusing on personnel policies that have the inherent ef-

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[13]Congress was well aware of the widespread existence of discretionary employment practices in the federal government. *See* H.R. Rep. No. 238, at 24 (referring to employees' fears that administrative complaints "will only result in antagonizing their supervisors and impairing any hope of future advancement."); S. Rep. No. 415, at 14 (same).

fect of discriminating against black, Spanish surname and women employees."[14]

In the course of the hearings in the House of Representatives on what was to become the 1972 Act, there was a specific focus on the question of whether the Civil Service Commission had validated *all* of its selection procedures and instruments. Thus, the Chair of the House Committee asked not only whether Civil Service tests and written examinations had been validated, but also if other selection techniques had been validated.[15] The Civil Service Commission, in reply, identified selection techniques other than tests as including the evaluation of the experience and training of applicants or employees, and went on to state: "In a few instances interviews are a part of the examination process. In other cases, and in the promotion program particularly, the appraisals of an individual's job performance and potential are considered in relation to the job to be filled."[16] With regard to *all* these qualification requirements, the Civil Service Commission claimed that: "The showing of direct relationships of job demands to the qualification requirements . . . is fully in conformity with the Supreme Court decision in *Griggs v. Duke Power Co.*"[17]

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[14]*Equal Employment Opportunities Enforcement Act of 1971*, Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.2515, S.2617, and H.R. 1746, Oct. 4, 6 and 7, 1971, p. 205.

[15]Letter to John H. Dent, Chairman, General Subcommittee on Labor, Committee on Education, and Labor, U.S. House of Representatives, from Irving Kator, Assistant Executive Director, United States Civil Service Commission, April 23, 1971, reproduced in *Equal Employment Opportunity Enforcement Procedures*, Hearings before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 1746, March 3, 4, and 18, 1971, pp. 382-83.

[16]*Id.* at 383.

[17]*Id.* As part of its submission, the Civil Service Commission introduced into the record the text of the 1969 Federal Personnel Manual Supplement (FPM) 335-1. Evaluation of Em-

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Given the criticisms of the Commission it had heard, Congress was understandably skeptical. Therefore, the House and Senate reports echoed Representative Fauntroy's criticisms and instructed:

> The Commission should be especially careful to ensure that its directives issued to Federal Agencies address themselves to the various forms of systematic discrimination in the system. . . . It apparently has not fully recognized that the general rules and procedures that it his promulgated may in themselves constitute systematic barriers to minorities and women.

Sen. Report No. 92-415, 92d Cong., 1st Sess., 1971, p. 14. The Senate report goes on to state:

> The Committee expects the Civil Service Commission to undertake a thorough reexamination of its entire testing and qualification program to ensure that the standards enunciated in the *Griggs* case are fully met.

Id. at 14-15. *See also* H. Rep. No. 92-238, 92d Cong., 1st Sess., 1971, pp. 24-25. In short, it is clear beyond any reasonable question that in 1972 Congress specifically mandated that the *Griggs* rule apply to *all* forms of selection and qualification requirements.

Finally, when Congress enacted the amendments to Title VII, the courts had uniformly extended disparate im-

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ployees for Promotion and Internal Placement. *Id.* at 336-62. The supplement required agencies to "give careful consideration" to which of the available evaluation instruments "are relevant to the job and are sound and dependable measures of the qualifications needed." *Id.* at 337. The FPM went on to discuss various evaluation instruments, including not only written and other types of tests, but also interviews and procedures for appraisals and assessment of potential. *Id.* at 340-42. With regard to *all* evaluation instruments, whether objective, subjective, or mixed, the FPM required that an agency determine the effectiveness of the instrument through establishing its validity and discussed and defined the three types of validity: content, construct and criterion related. *Id.* at 342-43. Thus, the Civil Service Commission attempted to convince Congress that *all* of the methods used in the federal service to select employees for jobs at all levels had been fully validated.

pact scrutiny to subjective employment practices. And "in language that could hardly be more explicit," *Franks v. Bowman Transportation Co.*, 424 U.S. at 764 n.21, the section-by-section analyses submitted to both Houses "confirm[ed] Congress' resolve to accept prevailing judicial interpretations regarding the scope of Title VII," *Local 28 of Sheet Metal Workers' International Association v. EEOC*, — U.S. —, —, 106 S.Ct. 3019, 3047 (1986): "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that *the present case law as developed by the courts would continue to govern the applicability and construction of Title VII.*" 118 Cong. Rec. 7166, 7564 (1972) (emphasis added).[18]

Congressional awareness of cases applying disparate impact analysis to subjective employment practices extended at least to *United States v. Sheet Metal Workers International Association, Local Union No. 36*, 416 F.2d 123 (8th Cir. 1969), cited by the House Committee Report as having "contributed significantly to the federal effort to combat employment discrimination," H.R. Rep. No. 238, at 13 n.14, and *Local 53 of the International Association of Heat & Frost Insulators v. Vogler*, 407 F.2d 1047 (5th Cir. 1969), cited by both the House and Senate Committee Reports as support for the "complex and pervasive" nature of employment discrimination, H.R. Rep. No. 238, at 8 n.2; S. Rep. No. 415, at 5 n.1.[19] *Sheet Metal Workers* involved

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[18]Moreover, with respect to the new § 706(a), which gave the EEOC more power to prevent persons from engaging in the employment practices made unlawful by §§ 703 and 704, see 86 Stat. at 104, the section-by-section analyses expressly stated that "the unlawful practices encompassed by [§§] 703 and 704, which were enumerated in 1964 in the original Act, *and as defined and expanded by the courts* remain in effect." 118 Cong. Rec. 7167, 7564 (1972) (emphasis added).

[19]In explaining the "complex and pervasive" nature of employment discrimination, the House and Senate Committee Reports also cited Cooper & Sobol, Seniority and Testing Under

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a union's practice of administering an examination, "partially subjective in nature," with "no established [pass/fail] standard." 416 F.2d at 136. The Eighth Circuit thought "it . . . essential that journeymen's examinations be objective in nature [and] that they be designed to test the ability of the applicant to do that work usually required of a journeyman." *Id.*

> In reaching this conclusion, we do not necessarily accept the government's contention that [the test administrator], as an individual, would, because of his past participation in the exclusionary policies of the Local, discriminate against Negroes in giving and grading journeymen's examinations. We are not here concerned with the individual who gives and grades the examination. *We are concerned rather with the system, the nature of the examination, its objectivity and its susceptibility to review.*

Id. (emphasis added). In *Vogler*, the Fifth Circuit also focused on the *effects* of subjective criteria. A district court order requiring a union to develop objective criteria for membership "based on industry need" was upheld because subjective criteria—calling for applicants to obtain recommendations from present members and to receive a favorable vote of a majority of the membership—caused the exclusion of blacks. *See* 407 F.2d at 1049-50, 1054-55.[20]

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Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 *Harv. L. Rev.* 1598 (1969). *See* H.R. Rep. No. 238, at 8 n.2; S. Rep. No. 415, at 15 n.1. That article argued that "[i]f any subjective procedure has a systematic effect in disadvantaging blacks, the employer should be required to show the same justification as for a test or other objective procedure." 82 *Harv. L. Rev.* at 1677.

[20]The other courts that had considered the issue prior to Congress' enactment of the amendments to Title VII agreed that disparate impact analysis could be applied to subjective practices. *See United States v. Dillon Supply Co.*, 429 F.2d 800, 802, 804 (4th Cir. 1970) (district court committed reversible error by failing to consider that "[p]ractices, policies or pat-

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Inasmuch as the contemporaneous case law included not only *Griggs*, but also lower court decisions applying § 703(a)(2) disparate impact analysis to subjective practices, Congress' express intent in 1972 firmly compels that application today.

IV. THE ADMINISTRATIVE INTERPRETATION OF TITLE VII SUPPORTS THE APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT PRACTICES

Further support for the application of disparate impact analysis to subjective practies is found in the administrative regulations concerning Title VII, which have consistently required the validation of all selection procedures. The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1986), "based upon principles which have been consistently upheld by the courts, the Congress, and the agencies," 43 Fed. Reg. 38290 (1978), contemplate application of disparate impact analysis to "any selection procedure," *id.* at § 1607.3, including "the full range of assessment techniques from traditional paper and pencil tests . . . through informal or casual interviews and unscored application forms." *Id.* at § 1607.16Q. And as the enforcing agencies' "administrative interpretation of

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terns, even though neutral on their face, may operate to segregate and classify on the basis of race at least as effectively as overt racial discrimination" where "the government offered proof of a decentralized system of hiring and assignment which vested broad authority on the supervisors of largely segregated departments and which had no uniform or objective standards for hiring or assignment"); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2d Cir. 1971) (finding that "jobs were made available to whites rather than to blacks" in part because "[t]here were no fixed or reasonably objective standards and procedures for hiring"); *Rowe v. General Motors Co.*, 457 F.2d 348, 355, 359 (5th Cir. 1972) (although employer had no "deliberate purpose to maintain or continue practices which discriminate," court struck down "promotion/transfer procedures which depend[ed] almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman").

the Act,"[21] the Guidelines are "entitled to great deference." *Albemarle*, 422 U.S. at 431; *Griggs*, 401 U.S. at 433-34; *see also Local 28 of Sheet Metal Workers' International Association v. EEOC*, — U.S. at —, 106 S.Ct. at 3044-45 (Court's interpretation of Title VII "confirmed by the contemporaneous interpretations of . . . both the Justice Department and the EEOC, the two federal agencies charged with enforc[ement responsibility.]"); *Local No. 93, International Association of Firefighters v. City of Cleveland*, — U.S. —, —, 106 S.Ct. 3063, 3073 (1986) (proffered construction of Act supported by EEOC guidelines). *Compare General Electric Co. v. Gilbert*, 429 U.S. 125, 141-45 (1976) (EEOC regulations not followed because they contradicted agency's earlier positions and were inconsistent with Congress' plain intent); *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 93-94 (1973) (same).[22]

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[21]The Guidelines were jointly adopted in 1978 by the Department of Justice, as well as the EEOC, the Civil Service Commission, and the Department of Labor. 29 C.F.R. § 1607.1A. Section 713(a) of Title VII authorizes the EEOC "to issue, amend or rescind suitable procedural regulations to carry out the provisions of [the statute]." 42 U.S.C. § 2000e-12(a).

[22]According to the Uniform Guidelines, a selection procedure having an adverse impact must be validated unless the employer "choose[s] to utilize alternative selection procedures in order to eliminate adverse impact." 29 C.F.R. § 1607.6A. No selection procedures are exempted from this requirement. The government, however, points out that "[t]here are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines," *id.* at § 1607.6B, and asserts that one such circumstance is the use of "informal or unscored selection procedure[s]." *Id.* at §1607.6B (1). The government then concludes that an employer need only "justify [the] continued use of [such] procedure[s] in accord with Federal law," *id.*, and that the articulation of a legitimate, nondiscriminatory reason suffices as the requisite justification. *See* Brief for the United States as Amicus Curiae at 19-20. This argument is a distortion of the Guidelines. First, the Guidelines also include "formal and scored procedures" as circumstances in which an employer cannot or need not utilize validation techniques. *See id.* at § 1607.6B(2). Second, the government

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In requiring applicaton of the disparate impact analysis to *all* selection procedures, the Guidelines track the now superseded administrative regulations upon which this Court relied in its affirmation of the disparate impact test in *Griggs*. The EEOC's 1966 and 1970 Guidelines,[23] which the Court treated "as [having] express[ed]

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has neglected to mention the first two clauses of § 1607.6B(1), which provide that an employer using an informal or unscored procedure should (1) "eliminate the adverse impact," or (2) "modify the procedure to one which is a formal, scored or quantified measure." Finally, the government's "belief" that the use of a selection procedure having a disparate impact may be justified by the mere articulation of a legitimate, nondiscriminatory reason is undermined by the questions and answers provided to explain the Guidelines:

> 36. How can users justify continued use of a procedure on a basis other than validity?
>
> A. Normally, the method of justifying selection procedures with an adverse impact and the method to which the Guidelines are primarily addressed, is validation. The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a "business necessity" for its continued use; therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of a selection procedure.

44 Fed. Reg. 11996, 12002 (1979). *Cf.* Comment, Applying Disparate Impact Theory to Subjective Employee Selection Procedures, 20 *Loy. L.A.L. Rev.* 375, 389 (1987) ("How to 'otherwise justify' . . . selection procedures remains an open question."). The government's proposed standard of justification would flout, rather than "accord" with, the federal law as announced in *Griggs*.

[23]The Guidelines on Employment Testing Procedures, issued in 1966, were not published in the Federal Register. They were superseded in 1970 by the Guidelines on Employee Selection Procedures, published at 35 Fed. Reg. 12333 (1970) (codified at 29 C.F.R. § 1607, superseded in 1978).

the will of Congress," *Griggs*, 401 U.S. at 434, interpreted Title VII to prohibit the use of any "test" that was discriminatory in operation and for which job-relatedness could not be established. 35 Fed. Reg. at 12334 (§ 1607.3). They defined the term "test" broadly, including within its scope such subjective practices as "scored interviews" and "interviewers' rating scales." *Id.* at 12334 (§ 1607.2). Elsewhere, the EEOC Guidelines recognized that "[s]election techniques other than tests," such as unscored "casual interviews" and "application forms," might also "have the effect of discriminating against minority groups." *Id.* at 12336 (§ 1607.13). Under those circumstances, the employer was required to validate the selection technique(s) at issue or to eliminate the disparate impact. *Id.*[24]

V. APPLICATION OF THE DISPARATE IMPACT ANALYSIS TO SUBJECTIVE PRACTICES FURTHERS THE PRIMARY PROPHYLACTIC PURPOSE OF TITLE VII

The application of § 703(a)(2) to subjective practices is entirely consistent with Title VII's central aim of "eliminating the effects of discrimination in the workplace." *Johnson v. Transportation Agency, Santa Clara County, Calif.*, — U.S. —, —, 107 S.Ct. 1442, 1451 (1987); *see also Teal*, 457 U.S. at 449 ("Congress' primary purpose was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."). It is also consistent with the statute's goal of en-

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[24]The Department of Labor, in its interpretation of Executive Order 11246, 33 Fed. Reg. 14392 (1968) (Employment Tests by Contractors and Subcontractors: Validation), similarly contemplated the validation of "*any* . . . performance measure used to judge qualifications for hire, transfer or promotion," including measures of "intelligence," "ability," "aptitudes," "knowledge and proficiency," as well as measures of "personality or temperament." *id.* at 14393 (§ 9). *See id.* at 14392 (§ 1(g)). Noting that "[s]election techniques other than tests may also be improperly used so as to have the effect of discriminating," the Department required that such techniques as "unscored interviews" and "unscored application forms" also be validated or adjusted to eliminate any disparate impact. *Id.* at 14393 (§ 10).

couraging employers to engage in voluntary self-examination of their employment practices, and will not unnecessarily or unreasonably diminish management prerogatives.

A. Title VII "Prohibits All Pactices in Whatever Form Which Create Inequality in Employment Opportunity"

While § 703(a)(2)'s broad proscription of discrimination in employment extends to *all* "practices, procedures, or tests neutral on their face, and even *neutral in terms of intent* . . . that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability," *Griggs*, 401 U.S. at 430, 432 (emphasis added), the government would have plaintiffs prove intent in all challenges to subjective employment practices.

However, irrespective of an employer's good intentions, the use of subjective selection criteria may unfairly restrict employment opportunities for minorities and women. Subjective criteria leave substantial room for deeply ingrained, unconscious biases. As one commentator has written: "A supervisor [who is] judging a subordinate for promotion potential tends to look for traits [in the subordinate] which the supervisor feels he himself has. It is, of course, much easier for a Caucasian male to find such traits in other Caucasian males than in minorities and women." Stacy, Subjective Criteria in Employment Decisions Under Title VII, 10 *Ga. L. Rev.* 737, 739 (1976). *See also* R. Plumbley, *Recruitment and Selection* 145-46 (1981) (When a candidate's background and personality "appear to have been similar to his, the interviewer is presupposed to be biased in favour of him. . . . Judgment can be warped in this way without the interviewer being conscious of it.").[25] Moreover, the criteria themselves may

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[25]*See, e.g., Wilmore v. City of Wilmington*, 699 F.2d 667, 673-74 (3d Cir. 1983) (exclusion of blacks from administrative jobs a result of both conscious and unconscious biases); *Chance v. Bd. of Examiners*, 330 F.Supp. 203, 223 (S.D.N.Y. 1971) (white interviewers may have unconsciously discriminated against blacks and Hispanics), *aff'd* 458 F.2d 1167 (2d Cir. 1972).

be "unrelated to measuring job capability." *Griggs*, 401 U.S. 432; *see* D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 1.23, at 27 (1986 Supp.) ("[T]he defendant [may be] unbiased in evaluating the candidates and . . . the disparate impact [may be] caused by differences in characteristics of the candidates which, if measured objectively, would surely trigger a demand for proof of job relatedness.").[26] The Court has made precisely this point with respect to subjective performance appraisals put forth by the employer in *Albemarle* in an attempt to validate the objective test at issue there. The Court rejected the proffered correlation, however, because the "supervisors [had been] asked to rank employees by a 'standard' that was extremely vague and fatally open to divergent interpretations." 422 U.S. at 433. The Court had no way of knowing "whether the criteria *actually* considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify [the] testing system." *Id.* (emphasis in original).[27] Thus, the Court was rightly concerned that the subjective performance appraisals may not have measured job-related skills.

In order to achieve Congress' primary purpose of "achieving equality of employment 'opportunities' and removing 'barriers' to such equality," *Teal*, 457 U.S. at 449, the disparate impact analysis must be applied to all employment practices, both objective and subjective.

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[26]*See, e.g., Hawkins v. Bounds*, 752 F.2d 500, 504 (10th Cir. 1985) ("The record in this case contains no evidence . . . that the practice of totally discretionary detailing or its use in the promotion procedure [was] required by business necessity."); *Segar v. Smith*, 738 F.2d 1249, 1288 (D.C. Cir. 1984) (defendant never even attempted to showing job-relatedness of subjective experience requirement), *cert. denied*, 471 U.S. 1115 (1985); *Greenspan v Automobile Club*, 495 F.Supp. 1021, 1033 (E.D. Mich. 1980) (defendant failed to base evaluations on job analysis).

[27]*Cf.* B. Schlei & P. Grossman, *Employment Discrimination Law* 203 (2d ed. 1983) (. . . [T]he evaluative devise [should have] fixed content and call[] for discrete judgments.").

B. Title VII Requires That Employers "Self-Examine and Self-Evaluate Their Employment Practices"

The government's apparent concern for management prerogatives cannot obscure the fact that the exclusion of subjective criteria from disparate impact analysis would allow and even encourage employers to avoid the introspective assessment of their employment practices as contemplated by Title VII. Provided a convenient sanctuary in subjective criteria, employers would be loathe "'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate . . . the last vestiges of an unfortunate and ignominious page in this country's history.'" *Albemarle*, 422 U.S. at 418 (quoting *United States v. N.L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973)). *Cf. United Steelworkers v. Weber*, 443 U.S. at 204 (Title VII "intended as a spur or catalyst" for employer efforts to eliminate effects of discrimination).

Rather than encourage self-examination, the government's proposed exemption for subjective practices would likely encourage blind adherence to those practices. *See Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985) ("Exclusion of . . . subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria."); D. Baldus & J. Cole, *Statistical Proof of Discrimination* § 1.23, at 27 (1986 Supp.) ("exclusion of subjective criteria from review under the disparate impact model may encourage employers to rely less on objective criteria and more on general standards"). Indeed, to avoid the potential for disparate impact liability, employers would be inclined simply to consider objective criteria, such as a diploma requirement, within the context of a subjective interview. Yet "[i]t could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria." *Griffin v. Carlin*, 755 F.2d at 1525; *see also Atonio v. Wards Cove Packing Co.*, 810 F.2d at

1485 ("It would subvert the purpose of Title VII to create an incentive to abandon efforts to validate objective criteria in favor of purely discretionary hiring methods.").[28]

Moreover, if any distinction *were* to be drawn between subjective and objective employment practices, one would expect the courts to scrutinize the former more carefully: Subjective employment practices are more susceptible to abuse than their objective counterparts. As the Ninth Circuit noted in *Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981) (footnote omitted): "Subjective job criteria present potential for serious abuse and should be viewed with much skepticism. Use of subjective job criteria not only has, in many instances, a disparate impact on minorities, but also provides a convenient pretext for discriminatory practices."[29]

The government suggests that application of the disparate impact analysis to subjective criteria would impose

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[28]The government asserts that the application of disparate impact analysis to subjective criteria will force employers either to abandon such criteria or to eliminate statistical disparities through the adoption of quotas—because "subjective selection devices . . . may not be susceptible to validation or other such objective substantiation." Brief for the United States as Amicus Curiae at 15. As noted *infra* at 28-30, the premise for such an assertion is unfounded: subjective criteria are in fact susceptible to validation techniques. The government makes no mention of the fact that the *failure* to apply disparate impact analysis to subjective criteria will cause employers to abandon *objective* criteria for reasons unrelated to either the promotion of business necessity or the enhancement of equal opportunity in employment.

[29]*See also Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975) ("Nonobjective hiring standards are always suspect because of their capacity for masking racial [bias]."); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.) ("Greater possibilities for abuse . . . are inherent in subjective definitions of employment selection and promotion criteria."), *vacated on other grounds*, 423 U.S. 809 (1975); *Muller v. United States Steel Corp.*, 509 F.2d 923, 928 (10th Cir.) ("personal and subjective criteria encourage and foster discrimination"), *cert. denied*, 423 U.S. 825 (1975); Baldus & Cole, *Statistical Proof of Discrimination* § 1.23, at 27 (1986 Supp.) (subjective criteria are "more susceptible to abuse").

an insuperable burden on employers because of the unfeasibility of validating such criteria. *See* Brief for the United States as Amicus Curiae at 14-15. That suggestion is without merit. The industrial psychology profession universally recognizes that "[i]nterviewers are subject to the same standards of reliability and validity as apply to tests." W. Cascio, *Applied Psychology in Personnel Management* 31 (2d ed. 1982).[30] All selection procedures, whether objective or subjective, may be demonstrated to be job-related through acceptable validation procedures.[31]

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[30]"The [industrial psychology] profession has taken the stand that all selection systems, including subjective ones, can and indeed should be validated. The literature contains numerous descriptions of validity studies of the most commonly used subjective processes, such as interviews, the evaluation of biographical data, and assessment center techniques." Bartholet, Application of Title VII to Jobs in High Places, 95 *Harv. L. Rev.* 947, 988 (1982). *See also* Arvey & Campion, The Employment Interview: A Summary and Review of Recent Research, 35 *Personnel Psychology* 281 (1982) ("Industrial and organizational psychologists have been studying the employment interview for more than 60 years in an effort to determine the reliability and validity of judgment based on the assessment device and also to discover the various psychological variables which influence these judgments."); W. Cascio, *Applied Psychology in Personnel Management* 31 (2d ed. 1982) ("[R]eliability and validity analyses [of interviews] can easily be made by accurately maintaining . . . records [of information gathered, action taken, and predictions of future performance].").

[31]*See generally* Doverspike, Barrett & Alexander, The Feasibility of Traditional Validation Procedures for Demonstrating Job-Relatedness, 9 *Law & Psychology Rev.* 35 (1985). The *Standards for Educational and Psychological Testing* (1985), jointly issued by the American Psychological Association, the American Education Research Association and the National Council on Measurements in Education, state that validity is the most important consideration in evaluating tests, *id.* at 9 ("Technical Standards for Test Construction and Evaluation"), and broadly define tests to include all "evaluative devices," as well as standardized ability instruments. *Id.* at 3. *See also* Guion, Recruiting, Selection and Job Placement, in *Handbook of Industrial and Organizational Psychology* 799 (M. Dunnette ed. 1983) ("[S]pecific items of information drawn from interviews [and] global judgments made by interviewers and others must be considered as "tests").

That the subjective elements of a promotion or hiring system can be validated is further evidenced by the government's own experience. The standard process for selecting federal employees for competitive positions contains a number of subjective elements, including the use of performance evaluations, interivews, and recommendations.[32] Nevertheless, the Office of Personnel Management requires, as did the Civil Service Commission before it, *see supra* at 16, that federal agencies, where feasible, validate all selection procedures and standards—including subjective criteria--according to the Uniform Guidelines on Employee Selection Procedures. *See* Federal Personnel Manual, Chap. 335, Supplement 335-1, subchapter 3-4(a) (1980). In those few instances where strict validation is not possible, the procedures and standards still must be shown to be job related. *Id.*

Amici have been involved in a number of cases under Title VII against a variety of federal agencies. In several instances, such agencies have validated their entire selection procedures, including those that involve subjective elements. For example, in *Harrison v. Lewis*, 559 F.Supp. 943 (D.D.C. 1983), the district court, after finding that blacks had suffered discrimination in selections for professional and administrative positions under the disparate impact theory, ordered the agency to revise and validate all elements of its selection process pursuant to the Uniform Guidelines, including subjective rating, ranking, and selection procedures. *See* 559 F.Supp. at 953. Subsequently, the agency commissioned a study by an industrial psychology firm and has reported to the court that they had successfully validated their procedures as ordered. In short, the actual and practical experience of the country's largest single employer, the United States Government, sharply contradicts the contentions advanced by the gov-

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[32] *See* B. Schlei and P. Grossman, *Employment Discrimination Law* 1187 n.5 (2d ed. 1983), for a summary description of the process.

ernment here that subjective criteria are impossible to validate.

CONCLUSION

For the reasons above, if it is appropriate to decide the merits, the judgment of the Fifth Circuit should be reversed.

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Respectfully submitted,

BILL LANN LEE*
STEPHEN M. CUTLER
Center for Law in the
Public Interest

JULIUS LEVONNE CHAMBERS
RONALD L. ELLIS
CHARLES STEPHEN RALSTON
NAACP Legal Defense and
Educational Fund, Inc.

ANTONIA HERNANDEZ
E. RICHARD LARSON
JOSE ROBERTO JUAREZ
Mexican American Legal Defense
and Educational Fund

JOAN M. GRAFF
PATRICIA A. SHIU
Employment Law Center
Counsel for Amici

*Counsel of Record

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No. 86-6139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON,

Petitioner,

—v.—

FORT WORTH BANK & TRUST,

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE WOMEN'S LEGAL DEFENSE FUND, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

DEBORAH A. ELLIS
Counsel of Record
ISABELLE KATZ PINZLER
JOAN E. BERTIN

American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for *Amici Curiae*

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INTEREST OF AMICI CURIAE[1/]

This brief amici curiae is submitted, pursuant to Rule 36.2 of the Rules of this Court, by the American Civil Liberties Union, the NOW Legal Defense and Education Fund, and the Women's Legal Defense Fund,[2/] and is filed in support of appellant Clara Watson.

STATEMENT OF THE CASE

Fourteen years ago, in 1973, Fort Worth Bank and Trust ("the Bank") hired Clara Watson, a black woman, as a proof operator. Watson v. Fort Worth Bank & Trust, 798 F 2d 791, 793 (5th Cir. 1986).[3/] At that time, the Bank employed only four other blacks in

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[1/] The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

[2/] Individual statements of interest for the amici are set forth in an Appendix to this brief.

[3/] References to 798 F.2d 791 (5th Cir. 1986), are to the published Fifth Circuit opinion in this case.

its fifty member work force: the porter, the kitchen attendant, and two others who printed checks in the basement. 798 F.2d at 808 (Goldberg, J., dissenting). Watson was assigned to work in a back room, where she was not visible to the Bank's customers. In 1975, Watson approached Gary Shipp, the bank's senior vice-president for personnel, and informed him of her interest in becoming a teller. Shipp rebuffed Watson with the remark that tellers have to handle too much money "for blacks." Tr. I18-19.

Notwithstanding this expression of overt racial bias, Watson was eventually promoted to a teller trainee and, after a short training period, became a teller in the motor bank, in January 1976. 798 F.2d at 793. She was later transferred to the main lobby and subsequently promoted to the position of commercial teller on February 2, 1980. Id.

In 1980 and 1981 Watson sought appointment to four supervisory vacancies in succession. Id. The Bank's selection criteria for hiring and promotion are non-existent or ambiguous because supervisors make promotions decisions according to their best judgment. The evidence showed that the individual who supervised a position made the employment decisions concerning subordinates, including promotion decisions, and although subject to routine review by management, those decisions were rarely reversed. Id. at 796. Richard Burt, who made the promotion decision in three of the four instances at issue here, testified at trial that he considered an applicant's experience, leadership, previous supervisory experience, ability to get along with others, and "fifty or one hundred other factors." Tr. III44-45. Although each employee was subject to annual performance evaluation reviews on a

scale of twelve categories,[4/] these performance evaluations were used primarily for salary review and did not play a substantial role in the promotions at issue here. 798 F.2d at 799.

In February 1980, Watson applied for the position of supervisor of tellers. Richard Burt, a white male, who was then supervisor of the bookkeeping department, was

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[4/] Many of the categories used in the performance evaluations are by their nature highly ambiguous. The twelve categories are: 1) accuracy of work; 2) alertness; 3) personal appearance; 4) supervisor-co-worker relations; 5) quantity of work; 6) physical fitness; 7) attendance; 8) dependability; 9) stability ("the ability to withstand pressure and remain calm in most situations"); 10) drive ("ambition"); 11) friendliness and courtesy; and 12) job knowledge. 798 F.2d at 812 n.26 (Goldberg, J., dissenting).

The rating system used to measure the categories is also subjective: 0-1, "does not meet minimum requirements"; 2-3, "does just enough to get by"; 4, "volume of work is satisfactory"; 5-6, "very industrious does more than is required"; 7-8, superior work production record." Id. Therefore, even the categories with seemingly objective content, such as "quantity of work performed," may become discretionary and subject to the rater bias inherent in such highly discretionary employment systems. See Point IA, infra.

selected. Both the district court and the Fifth Circuit credited the Bank's explanation that it had promoted Burt due to his greater experience.[5/] Although Watson had been at the bank six years longer than Burt, Burt had a year of supervisory experience in the bookkeeping department that Watson lacked. 798 F.2d at 793-94 & n.1.

Watson then applied for the position of supervisor of motor bank tellers. Burt, as supervisor of all tellers, selected Pat Cullar, a white woman, for the job. Again, Cullar was assertedly chosen for her greater experience. She had four fewer years experience than Watson at the Bank, but had seventeen years experience at another bank. Like Watson, she had no supervisory experience. The overall performance

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[5/] Although Burt had higher performance evaluations than Watson, "the district court clearly placed primary emphasis on Burt's ... experience." 798 F.2d at 799.

evaluation scores of Watson and Cullar were comparable (Watson scored 70 and Cullar 72, out of a possible 104). Id. at 794, 799.

Third, Watson applied again for lobby teller supervisor in 1981, after the Bank promoted Burt to assistant vice-president.[6/] Burt, the new supervisor of the position, selected Pat Cullar for this position too. Id. at 794.

Finally, as a result of Cullar's second promotion, Watson again applied for the supervisor of motor bank tellers. Burt selected Kevin Brown, a young white man, for the position. Brown had been at the bank just one year at the time of his promotion, and had worked only part-time for the first six months. See id. at 794 n.3. Although Brown had only "supervis[ed] teenage seasonal

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6/ Watson applied for this and the fourth promotion while on sick leave. 798 F.2d at 794. However, the Bank did not rely on this fact as a reason for its denial of the promotions. Id. at 799.

employees," at Six Flags Over Texas, an amusement park, id., the Bank relied on this meager supervisory experience as its reason for promoting Brown over Watson, id. at 799. The Fifth Circuit noted that Brown's promotion was also based on Cullar's "high ... recommendation, relying on his performance as a teller and as her assistant." Id. However, Brown's ratings were actually comparable to Watson's; Cullar rated him 80 in January 1980 and 89 in January 1981; Richard Burt rated Watson 84 in July 1980, her last written evaluation. Watson v. Fort Worth Bank & Trust, No. 4-81-581-E, slip. op. at 5 (Nov. 21, 1984).[7/]

The Bank's subjective policies for hiring and promotion have significantly

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[7/] Brown did not last long in his new position. In the September 1981 evaluation Cullar rated Brown's performace as a motor bank supervisor "fair" and his potential as "some." He resigned soon after, on December 3, 1981. Id.

impacted on black applicants and employees. Watson showed that a black applicant who applied for any job with the Bank had one-fourth the chance of a white applicant to get the job. 798 F.2d at 808 (Goldberg, J., dissenting). Specifically, of 533 white and 144 black applicants during a period of over four years, 16.7% of the whites and 4.2% of the blacks received offers of employment. Id. at 811. Watson's expert testified that the disparity was significant at 0.0001; the probability that the result was due to chance is one in ten thousand.[8/] Id. The pattern repeated itself with regard to applicants for teller positions, at the 0.01 significance level, and for applicants for clerical positions, at the 0.05 significance

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8/ Watson's statistical evidence was so compelling that discriminatory intent could be inferred under Title VII disparate treatment analysis. See Point II, infra.

level.[9] Id.

Watson also demonstrated that black employees were evaluated more severely than white employees, were paid less, and were advanced much more slowly in responsibilities and promotions. Id. at 808. Black employees were paid on average approximately $46 a month less for comparable work. Id. They advanced at a rate six-tenths of a pay grade per year less than the equally qualified white.[10] Id. A comparison of annual evaluations over four years showed that

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[9] Significance at the 0.01 and at the 0.05 level means that there is a one percent and five percent probability, respectively, that the disparity is due to chance. For large samples such as this, this Court's requirement of two or three standard deviations "is essentially equivalent to a rule requiring significance at a level in the range below 0.05 or 0.01. Id. at 810 (quoting Baldus & Cole, Statistical Proof of Discrimination § 9.03, at 297 (1980) (other citations omitted)).

[10] For all these comparisons, Watson's experts performed multiple regression analyses to control for factors such as educational level and prior experience. Id. at 812-13.

blacks rated an average of eleven to fifteen points lower than their non-black co-workers, differences that are statistically significant. Id. at 812-13. These facts are not surprising, given that the Bank has never had a black director or officer, or even a black supervisor. Id. at 808.

The Bank did not offer any evidence to explain these disparities. Id. at 810 n.19; Tr. III307. It also did not present any evidence as to the business necessity for its hiring and promotion policies.

SUMMARY OF ARGUMENT

The facts of this case demonstrate how facially neutral but subjective selection devices operate precisely like paper and pencil tests or height requirements, to the disproportionate disadvantage of women and minorities, regardless of the intent of the decision-maker. Because subjective systems are so susceptible to abuse in operation,

through conscious or unconscious bias, they should be subject to the "more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives," Washington v. Davis, 426 U.S. 229, 247 (1976), that Title VII requires for objective criteria.

Title VII demands that employers whose employment practices significantly disadvantage certain groups of employees, a showing easily made in this case, examine in a systematic and rational way the content of their jobs and the qualifications necessary to perform the job in order to insure, ultimately, that satisfactory employees are selected in a non-discriminatory fashion. Title VII imposes the same requirements regardless of whether an employer has initially elected to use facially neutral objective screening devices, or facially neutral subjective screening systems. It

would be anomalous, indeed, if subjective devices, which are so subject to conscious and unconscious abuse, were to receive greater judicial deference than objective devices, which are undeniably neutral in their content and application.

In this case, the evidence of race-based discrimination is so strong that it not only demonstrates the requisite "disparate impact," but also suffices to justify an inference of intentional discrimination. Under any theory of Title VII liability and recovery, the Bank inexcusably discriminated against Clara Watson.

ARGUMENT

Introduction

In the approximately quarter century since Title VII was enacted, employment discrimination and litigation to combat it have entered a new era. In 1964, overt

discriminatory practices were commonplace,[11] as were diploma requirements and standardized screening devices which disproportionately excluded minorities and women.[12] Judicial enforcement of our national commitment to equality of individual opportunity has largely eliminated overt discrimination in employment,[13] and many forms of invidious testing and screening practices have likewise been successfully curbed.[14] However, rather than devising new job-related objective

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11/ E.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) (employer did not accept applications from mothers with young children); Claiborne v. Illinois Central R.R., 583 F.2d 143 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979) (black employees classified as laborers; white employees as apprentices).

12/ See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (diploma requirement); Dothard v. Rawlinson, 433 U.S. 321 (1977) (minimum height and weight requirements).

13/ E.g., Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (invalidating unequal benefits for men and women in state retirement plan).

14/ See, e.g., cases cited in footnote 12, supra.

selection devices, many employers have shielded discriminatory decision-making by adopting subjective, often undefined, selection processes. These in turn pose new barriers, barriers that are often insurmountable unless Title VII's disparate impact analysis is used to challenge them.

This case exemplifies a widespread problem which severely limits the full integration into the American workplace of many employees whom Title VII was expressly intended to protect. Clara Watson was not denied promotions because she lacked identifiable qualifications, such as a high school diploma, that she could obtain in order to qualify. Although her performance reviews reveal that she was a competent employee, her efforts to progress were thwarted four times, on each occasion by operation of a supervisor's subjective assessment of "fifty or one hundred" other

factors which were never identified.

All of Watson's supervisors were white, and their judgments varied in each instance to disfavor Watson. Watson had more years of general banking experience than Richard Burt, so the Bank relied on Burt's supervisory experience; Watson had more experience at the Bank and she and Pat Cullar both lacked supervisory experience and had comparable evaluations, so the Bank relied on Cullar's greater years of general banking experience; Watson had more banking experience than Kevin Brown and comparable evaluation ratings, so the Bank credited Brown's brief supervisory experience at an amusement park more highly than Watson's eight years of successful service to the Bank.[15/] These criteria did not impact only on Watson; at the time of

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15/ As even the Fifth Circuit recognized, the Bank's explanations for not promoting Watson are "somewhat inconsistent." 798 F.2d at 799.

trial, Fort Worth Bank, which employed 79 people, still had no black supervisors.

The barriers faced by Clara Watson and other employees at the Bank confront many minority and female employees. Despite significant advances for these groups, the large scale effects of discrimination, both intentional and unintentional, persist. The median weekly earnings and occupational choices of minority and female employees lag far behind those of white males. Median weekly earnings for full-time employees in 1983 were $397 for white men, $253 for white women, $299 for black men, $231 for black women, $274 for Hispanic men and $209 for Hispanic women.[16/] The Bureau of Labor Statistics reports that "the very highly paid professional and managerial occupations are

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16/ Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 419 (1985).

still predominantly male."[17/] As of August 1985, 13.5% of white male workers held executive administrative, and managerial jobs, in contrast to 6.2% of black male workers, 9.7% of white female workers, and 6% of black female workers at these levels.

17/ Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 2168, Women at Work: A Chartbook iii, 28 (Apr. 1983).

I. TITLE VII'S DISPARATE IMPACT ANALYSIS APPLIES TO SUBJECTIVE CRITERIA

A. Subjective Criteria Are The Kind Of "Built-In Headwinds" Prohibited by Title VII

As this Court recognized in Griggs v. Duke Power Co., Title VII prohibits not only intentional discrimination, but also "practices that are fair in form, but discriminatory in operation." 401 U.S. at 424, 431 (1971). Subjective criteria, like objective criteria, are "facially neutral" when applied without discriminatory intent, but by their nature are even more susceptible than objective criteria to abuse, in that they can conceal covert and unconscious bias and thus have a severely discriminatory impact.

Subjective selection criteria present an almost unparalled opportunity for bias. They conceal the most difficult and evasive form of discrimination: the hidden, subtle and

possibly subconscious preferences of the decision-makers to select others with their own cultural experience and background. The failure to identify qualities essential to job performance, and the reliance instead on highly discretionary factors, which may bear little or no relevance to successful job performance, as in this case, characterize this subtle but invidious form of discrimination. Cultural bias, whether incorporated in tests or individual decision-making, is precisely the kind of "built-in headwind[]" Title VII was intended to eliminate. Griggs, 401 U.S. at 432.

The subjective assessment often varies infinitely in its application among applicants. As manifested by Richard Burt, who testified that he considered fifty or one hundred factors, careful job analysis rarely informs the subjective preference for certain personality traits. Individuals who screen

applicants are seldom trained in job analysis and can easily substitute untutored bias for a rational approach to decision-making. For example, personnel officers may simply decide in the abstract that ambition or perseverance are good qualities in all employees. Worse, they may consciously or unconsciously prefer applicants who most resemble themselves.

The subjective decision-making process in this case illustrates the unregulated discretion that often characterizes such systems. This Court's description of the selection system in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), is equally apt for the process here: "There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria

of any kind." Id. at 433. The lack of a "focused and stable body of criteria" at the Bank meant that even the same decisionmaker -- Richard Burt -- used different criteria, or different weightings of the criteria, at various times.

Numerous courts have recognized that subjective decision-making procedures are inherently subject to bias.[18/] Subjective assessments often incorporate and perpetuate the racial and sexual stereotypes forbidden by Title VII. In one case, "[the interviewer] had a tendency to equate pleasant personality characteristics, and particularly an ability to work well with

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18/ See, e.g., Coble v. Hot Springs School Dist., 682 F.2d 721, 726 (8th Cir. 1982); Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835, 842 (10th Cir. 1981); Wade v. Mississippi Coop. Ext. Service, Inc., 528 F.2d 508, 518 (5th Cir. 1976); Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

others, with white people."[19/] In another, "Black agents who do not conform to the expectations White agents and especially their White group supervisors have about them, are criticized for being too aggressive and too abrasive"[20/] on supervisory evaluations for promotions. And in a recent case from the District of Columbia Circuit, the court recognized the "unconscious sexual stereotyping [used] by male evaluators": "A number of these complaints about plaintiff's lack of 'interpersonal skills' were couched in terms of her sex. One critic suggested that Hopkins needed to take a 'course at

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19/ Robbins v. White-Wilson Medical Clinic, 660 F.2d 1064, 1068 (5th Cir. 1981), vacated and remanded on other grounds, 456 U.S. 969 (1982).

20/ Segar v. Civiletti, 508 F. Supp. 690, 706 (D.D.C.1981), modified on other grounds sub. nom. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

charm school.'"[21]

Many courts have also recognized that subjective procedures may be discriminatory even when they are adopted and implemented without conscious or direct discriminatory intent.[22] This recognition is confirmed by psychological studies showing that unintentional racial and sexual bias affect evaluations of employees' performance, and that these effects are exacerbated when a measurement device is highly subjective.[23] The Fifth Circuit observed many years ago that "procedures which depend almost entirely upon the subjective evaluation and favorable

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[21] Hopkins v. Price Waterhouse, No. 85-6052, slip op. at 9, 6 (D.C. Cir. Aug. 4, 1987).

[22] E.g., Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc).

[23] Evaluations are more likely to show bias when the evaluation process is ambiguous because there is less possibility for biased inferences as rating discretion becomes more circumscribed. Nieva & Gutek, Sex Effects on Evaluation, 5 Academy of Management Review 267, 270 (1980).

recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks ... We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).[24/] Social science research confirms this observation. A comprehensive 1985 review of 74 laboratory and field experiments conducted between 1966 and 1981 concluded that both black and white raters give higher ratings to persons of

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24/ See also Royal v. Missouri Highway and Transportation Commission, 655 F.2d 159, 164 (8th Cir. 1981) ("when the evaluators themselves are not members of the protected minority ... the decision should be subject to particularly close scrutiny"); Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977) ("almost all of the foremen ... are white"); Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975) ("[n]onobjective hiring standards are always suspect because of their capacity for masking racial bias").

their own race.[25] Here, Watson was never rated by anyone of her own race, as Fort Worth Bank and Trust had no black officers or supervisors. Studies have also shown that people rate others' performance on a task more accurately, and express more confidence in the accuracy of their ratings, when rating someone of their own race.[26] Given the historical and continuing prevalence of whites in supervisory positions, such as at the Bank, this tendency perpetuates past discrimination. The effect is magnified further by the additional finding that black employees tend to receive more negative ratings when they constitute only a small

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[25] Kraiger & Ford, A Meta-Analysis of Ratee Race Effects in Performance Ratings, 70 J. of Applied Psychology 56 (1985).

[26] Schmitt & Lappin, Race and Sex as Determinants of the Mean and Variance of Performance Ratings, 65 J. of Applied Psychology 428 (1980).

percentage of the workforce,[27] as in this case.

Similarly, subjective evaluation systems may easily incorporate and perpetuate pernicious sex role stereotyping, a problem of particular concern to amici herein. Numerous studies have demonstrated that stereotypical conceptions have a strong effect on the evaluations of the work of men and women, especially when the evaluation criteria are ambiguous.[28] Both men and women raters show an anti-female bias when rating women for traditionally "masculine"

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[27] Kraiger & Ford, supra note 25, at 61.

[28] E.g., Nieva & Gutek, supra note 23. For example, a recent study replicated and extended a 1968 experiment in which male and female subjects were randomly assigned to read an essay with the author's name indicated as either John T. McKay or Joan T. McKay. Although the essays were identical, both male and female readers gave higher ratings to the essay authored by "John" or "J.T." than that written by "Joan." Paludi & Strayer, What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name, 12 Sex Roles 353 (1985).

jobs, such as supervisory or managerial positions.[29]

Studies have also shown that women are more vulnerable than men to bias on the basis of physical appearance. In many subjective evaluations, as in the case at hand, one of the criteria is "personal appearance." Such a criteria is more likely to have an impact on women, which can be beneficial or deleterious depending on the job at issue. Attractiveness proves to be advantageous for women in nonmanagerial positions and disadvantageous for women in managerial jobs. However, appearance has no effects on reactions to men for any type of job.[30]

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[29] Nieva & Gutek, supra note 23, at 271-73; Rosen & Jerdee, Effect of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions, 59 J. of Applied Psychology 511 (1974).

[30] Heilman & Stopeck, Being Attractive, Advantage or Disadvantage? Performance-Based Evaluations and Recommended Personnel Actions as a Function of Appearance, Sex, and Job Type, 35 Organizational Behavior and Human Decision Processes 202 (1985).

The facts of this case illustrate how subjective criteria, even if adopted and applied without direct or conscious discriminatory intent, are even more likely than objective criteria to discriminate against the groups Title VII is intended to protect. Because there were no black supervisors at the Bank, Watson was never evaluated by a person of her race. And the Bank's discretionary application of its highly ambiguous subjective criteria always worked to Watson's disadvantage, to deny her four opportunities for promotion. As Watson demonstrated at trial, the Bank's subjective policies severely impacted on other black employees as well.

B. Applying Disparate Impact Theory to Subjective Employment Practices Is Necessary to Achieve Title VII's Purposes

Title VII's disparate impact analysis applies to the subtle barriers encompassed in subjective screening devices for, as Justice

Frankfurter declared in another context, the law "nullifies sophisticated as well as simple-minded modes of discrimination."[31] The purpose and language of Title VII, its legislative history, the guidelines interpreting it, decisions of this Court, and the nature of employment decisions all compel the conclusion that the disparate impact model is available to challenge subjective practices in order to "achieve equality of employment opportunity." Griggs, 401 U.S. at 429.[32]

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[31] Lane v. Wilson, 307 U.S. 268, 275 (1939) (striking down Oklahoma's restrictive voter-registration statute under the fifteenth amendment).

[32] The majority of Courts of Appeals -- the Third, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits -- have held that disparate impact analysis applies to subjective criteria. See, e.g., Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987) (en banc); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985); Lasso v. Woodmen of World Life Insurance Co., Inc., 741 F.2d 1241 (10th Cir. 1984), cert. denied, 471 U.S. 1099 (1985); Griffin v. Carlin, 755 (footnote cont'd)

Title VII unequivocally proscribes all forms of employment discrimination without distinguishing between objective or subjective practices. Under Title VII it is an unlawful employment practice "to limit segregate, or classify ... employees or applicants for employment in any way.... 42

F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C.Cir. 1984), cert. denied, 471 U.S. 1115 (1985). The Fourth, Fifth, Seventh, and Eighth Circuits have reached conflicting results. See, e.g., Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 569 (4th Cir. 1985) (applying impact analysis); E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633, 638-39 (4th Cir. 1983), rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) (refusing to apply impact analysis); Page v. U.S. Industries, Inc., 726 F.2d 1038, 1054 (5th Cir. 1984) (applying impact analysis); Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795, 802 (5th Cir. 1982) (refusing to apply impact analysis); Griffin v. Board of Regents, 795 F.2d 1281, 1288-89 and n.14 (7th Cir. 1986) (refusing to apply impact analysis); Regner v. City of Chicago, 789 F.2d 534, 539 (7th Cir. 1986) (applying impact analysis); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984) (refusing to apply impact analysis); Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984) (applying impact analysis). Only one Circuit, the Second, has refused to apply disparate impact analysis to subjective criteria. See, e.g., Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 605 (2d Cir. 1986).

U.S.C. § 2000e-2(a) (emphasis added). In 1971, this Court construed this statutory language to prohibit "not only overt discrimination but also practices that are fair in form but discriminatory in operation," Griggs, 401 U.S. at 431. The disparate impact model developed in Griggs sought to fulfill Congress' objective of "achiev[ing] equality of employment opportunities" by removing "artificial, arbitrary, and unnecessary barriers to employment." Id. at 429, 431.

When it enacted the 1972 amendments to Title VII, Congress endorsed the disparate impact model enunciated in Griggs[33/] and

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33/ See Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982) ("The legislative history of the 1972 amendments ... demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in Griggs").

Because the nature of employment discrimination was not clearly understood when Title VII was enacted in 1964, at that time Title VII was generally thought to prohibit only intentional discrimination. A 1972 Congressional report reflected: "In 1964, employment (footnote cont'd)

recognized that employment discrimination is a "complex and pervasive phenomenon" that should be described in terms of "'systems' and 'effects' rather than simply intentional wrongs."[34/] At the time of the 1972 amendments, Congress also adopted the existing decisional law, which included cases that applied Griggs to invalidate subjective hiring standards and procedures, such as United States v. Bethlehem Steel Corp., 446 F.2d 652, 657-59 (2d Cir. 1971).

The 1972 amendments also demonstrate Congress' aim to eradicate discrimination in

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discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization .... Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs." S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971).

34/ See e.g., H.R. Rep. No. 238, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2144; S. Rep. No. 415, supra note 33, at 4-5.

upper level jobs, in which subjective decision-making processes are more common. For example, one of the 1972 amendments to Title VII extended its coverage to academic institutions,[35], demonstrating that Congress intended jobs such as professorships to be analyzed like other jobs. A Senate Report found:

> [I]n the higher-paying and more prestigious positions in the institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominantly black institutions. Women are similarly subject to discriminatory patterns. Not only are they generally under-represented in institutions of higher learning, but those few that do obtain positions are generally paid less and advance more slowly than their male counterparts. ... The committee believes that it is essential that these employees be given the same opportunity to redress their

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35/ Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (1972) (codified at 42 U.S.C. § 2000e-1) (abolishing the exemption for the employment of individuals engaged in educational activities at non-religious schools).

> grievances as are available to other employees in the other sectors of business.

S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971) (emphasis added). Congress also considered and rejected a proposal to exempt another upper level occupation, physicians and surgeons. Senator Javits articulated his opposition to the proposed exemption:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
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> Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion - just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain - and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to

> be subject to discrimination in respect of it, and the Federal law will not protect them.

118 Cong. Rec. 3802 (1972) (statement of Sen. Javits). Congress also expanded Title VII in 1972 to include public employment. In all these instances, Congress extended Title VII protection with the awareness that the central obstacle was not overt discrimination but the covert bias embodied in "systems" and manifested in "effects."[36/]

The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, developed by the four federal agencies charged with enforcing Title VII--the Equal Employment Opportunity Commission, the Office of Personnel Management, the Department of Justice and the Department of Labor--also interpret Title VII to require the application of the disparate impact model to

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36/ See footnote 33, supra.

all selection procedures, whether objective or subjective, by defining the selection procedures to which disparate impact applies as follows:

> Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

29 C..F.R. § 1607.16(Q). These guidelines support the statutory language and legislative history and are therefore "entitled to great deference." Griggs, 401 U.S. at 434.

Although this Court has never explicitly addressed whether disparate impact analysis applies to subjective criteria, its decisions suggest that Title VII's proscription against practices that have discriminatory effects is available in challenges to subjective as well

as to objective selection devices. In Griggs, the seminal disparate impact case, this Court spoke broadly of "procedures," "practices," "fair in form" and "artificial, arbitrary and unnecessary barriers to employment," all terms which encompass subjective procedures.[37/] And in Teamsters v. United States, the Court recognized that "either theory [disparate impact or disparate treatment] may, of course, be applied to a particular set of facts," 431 U.S. 324, 335 n.15 (1977). In short, the Court's reasoning in Griggs and its progeny--that disparate impact analysis may reveal discrimination deeply ingrained in employment systems that would otherwise go unrecognized--applies with

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37/ 401 U.S. at 429, 431. Not one of this Court's disparate impact decisions uses the term "objective." See Griggs, 401 U.S. at 424; Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 40[illegible] (1973); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982).

equal if not greater force to subjective devices which so readily lend themselves to individual bias.

Some courts and commentators have erroneously interpreted a footnote in Furnco Construction Corp. v. Waters, 438 U.S. 567, 575 n.7 (1978), to disapprove the use of disparate impact analysis for subjective procedures. In Furnco, the Court noted in passing that it did not use disparate impact analysis because "[t]his case did not involve employment tests...or particularized requirements such as ... height and weight specifications," id., the usual context in which disparate impact was applied. However, disparate impact analysis was inappropriate in Furnco because the plaintiffs did not prove that the practice actually had an adverse impact on black bricklayers, 438 U.S.

at 571.[38/] Thus, the prima facie case which would trigger application of the business necessity defense in disparate analysis was absent in Furnco. In contrast, in this case the disparate impact of the bank's admittedly subjective employment system has been proved: "the numbers ... belie the bank's claim that it has not discriminated against the class on the basis of race." 798 F.2d at 808 (Goldberg, J., dissenting).

All the above factors compel the use of disparate impact analysis for the subjective employment practices at issue here. In addition, to draw a bright line between objective and subjective criteria would ignore the complexity of employment decisions and would encourage employers to use

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38/ Moreover, the policy in Furnco -- a referrals-only hiring policy which prevented the supervisor from hiring anyone at the gate -- involved objective application of a hiring hall system and raised no question of subjective evaluations.

employment practices that are most likely to have a discriminatory impact.

Objective and subjective requirements are more properly viewed as "extremes on a continuum"[39/] rather than as the test for which analytic tool to use. The conclusion that a practice is not "facially neutral" because it is subjective glosses over the significant similarities between objective and subjective criteria.[40/] Subjective

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39/ Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc).

40/ Experience requirements are an example of the type of requirement that can be objective or subjective. For example, in Kilgo v. Bowman Transportation, 570 F. Supp. 1509 (N.D. Ga. 1983), aff'd, 789 F.2d 859 (11th Cir. 1986), the employer required one year of over-the-road commercial tractor-trailer driving which, like a high school diploma, the applicants either had or did not have (although the employer sometimes discriminatorily waived the requirement). That explicitly defined experience requirement is in stark contrast to the highly variable experience requirement used at the Bank.

procedures can be as "facially neutral" as objective ones, although because of their nature it is even more likely that "prior societal discrimination has been incorporated (for perhaps non-discriminatory reasons) into the decision-making process."[41] For example, courts have labelled as subjective both practices that have no discretion and those that are highly discretionary.[42] And even an apparently "objective" component of a subjective process, such as the experience

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[41] Brief of United States as Amicus Curiae on Petition for Writ of Certiorari at 13, n.12 ("Brief of United States"). Illogically, the Solicitor General suggests that this "prior societal discrimination" has only been incorporated into objective criteria.

[42] For instance, in Pouncy v. Prudential Insurance Co., 668 F.2d 795, 799 (5th Cir. 1982), the company did not post any vacancies, a practice which encompassed no discretion. In Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981), the practice at issue was discharges based on "poor workmanship," a criterion which can either be discretionary or based on objective factors. See generally Rigler, Title VII and the Applicability of Disparate Impact Analysis to Subjective Selection Criteria, 88 W.Va.L.Rev. 25, 33-40 (1985).

requirement at Fort Worth Bank, can be applied in a discretionary fashion, so that experience at an amusement park is given more weight than experience at the Bank itself.

Not one of the courts that have held that subjective criteria may not be analyzed under disparate impact has delineated how it determined that a particular test was subjective rather than objective. Because that preliminary decision will be often be dispositive,[43/] an important practical reason for concluding that subjective criteria are

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43/ The employer's burden under the disparate treatment model is significantly less than under disparate impact analysis. Under the disparate treatment model, the employer need only explain the differential treatment, and the plaintiff must prove that the explanation is a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973). In contrast, under the disparate impact theory the employer must demonstrate the business necessity of the discriminatory selection device. Griggs, 401 U.S. at 431. In this case, although the Bank articulated "somewhat inconsistent," 798 F.2d at 799, reasons for rejecting Watson, it did not offer any evidence as to the business necessity of its procedure nor could it have, as the criteria had not been subject to even minimal validation.

subject to impact analysis is that courts will avoid the enormous and difficult task of deciding whether a procedure should be labelled objective or subjective.

Excluding subjective practices from the reach of disparate impact analysis serves no legitimate purpose and would encourage employers to abandon validated objective criteria in favor of discretionary hiring methods. If subjective practices are exempted from the same stringent analysis accorded objective devices with discriminatory effects, "[r]ather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions."44/ It would be ironic indeed if patently neutral but objective devices received less judicial

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44/ Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985).

deference than inherently suspect subjective ones. For, "[i]f, in fact, the subjective practices are a 'covert means' to discriminate intentionally, by definition intent will be difficult to prove."[45/] Encouraging employers to insulate their discriminatory employment decisions from review cannot be reconciled with Congress' determination to "achieve equality of employment opportunity." Griggs, 401 U.S. at 429.

C. Applying Disparate Impact Analysis to Subjective Criteria is Not Burdensome to Employers

Employers who seek to use subjective criteria that discriminate have to make the same showing as employers who use objective criteria that discriminate--to demonstrate "business necessity" by showing that the discriminatory practice has "a manifest

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45/ Atonio v. Wards Cove Packing Co., Inc., supra, 810 F.2d at 1484.

relationship to the employment in question." Griggs, 401 U.S. at 431, 432. Business necessity is traditionally proved by showing that "a discriminatory employment practice [is] necessary to safe and efficient job performance." Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977). As the amicus brief filed in support of petitioner by the American Psychological Association ("APA") demonstrates, subjective criteria can be professionally validated in accord with Griggs business necessity requirements with the same ease as objective devices. Amici herein rely on the APA's exposition of how subjective criteria, including the criteria used in this case, can and should be scientifically validated.

The ease with which validation requirements may be applied to subjective criteria dispels the premise behind the

Solicitor General's[46/] opposition to disparate impact analysis for subjective criteria: that employers will be forced to the choice of replacing subjective criteria with objective tests or of instituting quotas. The facts in this case and other cases where subjective criteria have been challenged also contradict the Solicitor General's position; far from being unduly burdened with demonstrating the validity of subjective testing, employers whose subjective employment practices have been found to discriminate have not made even minimal attempts to demonstrate business necessity.

Most often, subjective criteria have failed the business necessity test because, like here, the employer has not offered any

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[46/] Brief of United States at 15.

justification for the subjective device.[47/] For example, in Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985), the court invalidated the Post Office's practice of promotions based on "detailing," i.e., promoting those employees who had been temporarily appointed to higher level positions. Black employees had never been "detailed" and the Post Office had no guidelines for making the temporary appointments. The court found that "[t]he record in this case contains no evidence tending to show that the practice of totally

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47/ In other cases the employer offered only a patently flimsy business justification for its discriminatory subjective criteria. For example, in Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1011 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981), the employer defended its practice of selecting foremen through "word-of-mouth on the basis of wholly subjective criteria" only by citing the dangerousness of ironwork and opining that no other method of selection would work. The court found that these reasons did not constitute business necessity because the plaintiffs showed that the superintendents selected those who were their friends, that many of those so selected had bad safety records and had less experience as ironworkers than the black plaintiffs. Id. at 1010.

discretionary detailing or its use in the promotion procedure were required by business necessity." Id. at 504 (emphasis added). Similarly, in Crawford v. Western Electric Co., Inc., the employer did not "present ... a scintilla of evidence to demonstrate a business necessity for the mechanics of an Index Review System which allows supervisors to make wholly subjective evaluations of employees, without simultaneously making written records of their reasons," 745 F.2d 1373, 1386 (11th Cir. 1984) (emphasis added).[48/]

48/ See also, e.g., E.E.O.C. v. Rath Packing, 787 F.2d 318, 328 (8th Cir. 1986) (the employer "was unable to identify the criteria and qualifications which were considered in the hiring decisions"); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 570 (4th Cir. 1985) (testimony offered to prove business necessity "of vaguest sort, consisting essentially of general assertions"); Brito v. Zia Co., 478 F.2d 1200, 1205 (10th Cir. 1973) ("[t]he Zia Company ... failed to introduce evidence of the validity of its employee performance evaluation test consisting of empirical data demonstrating that the test was significantly correlated with significant elements of work behavior").

In some cases the employers' standards have been so vague or nonexistent that it was impossible for the court to begin even a rudimentary inquiry into business necessity. For example, this Court observed in Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975), that a validation test where supervisors were asked to rank groups of employees as to who "did a better job" was "extremely vague and fatally open to divergent interpretations":

> There is no way of knowing precisely what criteria of job performance the supervisors were considering.... There is, in short, simply no way to determine whether the criteria actually considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

Id. at 433 (emphasis in original) (footnote omitted).

Courts have upheld subjective criteria when they have found that the employer

demonstrates business necessity.[49/] For example, in Wilson v. Michigan Bell Telephone Co., 550 F.Supp. 1296 (E.D.Mich. 1982), the court found[50/] that an "assessment center" process for potential salesmen was justified by business necessity. In so holding, it relied on an article in the Journal of Applied Psychology finding that ratings Bell System assessment centers bore a strong relationship to subsequent job performance, and on testimony of a black female member of the assessment staff who had participated in

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49/ Although the business necessity test should be applied to require both an analysis of the requirements of the job and whether the subjective criteria measure those requirements, in fact courts have sometimes upheld the use of subjective criteria so long as discretion is circumscribed and there are procedural safeguards. See e.g., E.E.O.C. v. E.I. du Pont de Nemours & Co., 445 F.Supp. 223 (D.Del. 1978) (upholding a subjective supervisor system because of precedural safeguards). Amici submit that such safeguards, while important, are not a substitute for validation.

50/ This was an alternative holding. The court also held that disparate impact had not been proved. 550 F. Supp. at 1300.

the assessment of plaintiff. Id. at 1300-01.

Far from burdening employers, subjecting discriminatory subjective criteria to validation will promote Title VII's goals and lead to better merit selection for all employees.[51/] If employers know that their discriminatory subjective practices can be challenged under disparate impact analysis, they will be motivated to adopt criteria that are tailored to job requirements instead of variable and ambiguous policies like those used at the Bank. "[A] primary objective of Title VII is prophylactic: to achieve equal employment opportunities and to remove barriers that have operated to favor white males over other employees." Teamsters v. United States, supra, 431 U.S. at 364. Many

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51/ It should be noted in this context that Kevin Brown, the employee selected over Watson for the fourth promotion, subsequently received poor performance ratings and soon resigned from the Bank. See footnote 7, supra.

of the objective tests struck down under Title VII had little relevance to the qualities demanded by the job and have been replaced by criteria that more accurately measure job requirements. For example, New York City firefighters were once selected based on their knowledge of such words as "attest", "luminous," and "irate." Vulcan Soc'y of the N.Y. City Fire Dep't v. Civil Service Comm'n, 490 F.2d 387, 397 n.12 (2d Cir. 1973). As a result of suits brought by both minority group members and women, New York City firefighters are now selected from tests that more closely (but not perfectly, in the view of the amici) measure fire-fighting abilties, such as a simulation of engine company and ladder company tasks. See Berkman v. City of New York, 812 F.2d 52, 54-55 (2d Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3017 (July 13, 1987).

The Solicitor General's argument that subjective practices should be shielded from disparate impact scrutiny in order to protect traditional "management prerogatives" and "union freedoms," Brief of U.S. at 15, would effectively immunize subjective practices from Title VII review. Although Title VII leaves considerable discretion to employers,[52/] it does not insulate any particular subset of discriminatory job decisions from review. The employer in Griggs exercised its "management prerogative" by requiring a high school diploma and intellegence tests--"the Company ... judg[ed] that they generally would improve the overall

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52/ As Professor Bartholet points out, "[o]ne of the great advantages of the Griggs approach is that, by focusing on results and proof of job-relatedness, it gives the employer maximum freedom to design employment systems; the sole constraint is that the systems must not [discriminate] unless there is a powerful justification for their doing so." Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L.Rev. 947, 1008 (1982).

quality of the workforce," 401 U.S. at 431--but the discriminatory employer policies in Griggs, like those at issue here, had to be justified by business necessity. Here, Clara Watson prevails under a disparate impact analysis, because the Bank did not offer any evidence to establish the business necessity of its discriminatory subjective policies.

II. WATSON ALSO MADE A SUFFICIENT SHOWING TO PREVAIL UNDER DISPARATE TREATMENT ANALYSIS

As noted above, this Court held in Teamsters v. United States, that either theory of Title VII liability, i.e. disparate impact or disparate treatment, may be applied to a particular set of facts. 431 U.S. at 335 n.15. In addition to proving her case under the disparate impact theory, Watson also adduced sufficient facts to prevail under the classwide[53/] disparate treatment

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53/ The class here was ultimately de-certified and the class action question is not before this Court. However, lower courts which have addressed the use of classwide statistics in individual cases have held that classwide statistical evidence alone may establish a prima facie case of employment discrimination in an individual as well as class action case, e.g., Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979), or that classwide statistical evidence is relevant and probative in individual cases, e.g., Sweat v. Miller Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) (statistics relevant to showing pretext); Anderson v. City of Albuquerque, 690 F.2d 796, 802 (10th Cir. 1982) (de-certified class); Kaplan v. International Alliance of Theatrical and Stage Operators, 525 F.2d 1354, 1358 (9th Cir. 1975); King v. Yellow Freight System, Inc., 523 F.2d 879, 882 (8th Cir. 1975) (statistics relevant to motive and (footnote cont'd)

approach outlined in Teamsters. In fact, it was for this very reason that Judge Goldberg, in his dissent below, found it unnecessary even to reach the question of whether disparate impact theory applied to these facts. 798 F.2d at 808 & n.17. As required under Teamsters, Watson demonstrated through her statistical studies a "pattern or practice of resistance to the full enjoyment of Title VII rights." 431 U.S. at 336. Her unrebutted statistical evidence proved more than "the mere occurrence of isolated or 'accidental' and or sporadic discriminatory acts." Id.

> ... Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination...
> "In many cases the only available avenue of proof is the use of racial

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intent); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). Indeed Watson could also prevail under the individual disparate treatment approach of McDonnell Douglas and Burdine, see infra.

> statistics to uncover clandestine and covert discrimination ..."

Id. at 339 n.20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984 (1971)).

Under the disparate treatment approach a plaintiff must prove intent to discriminate. This Court, however, has made it clear that a statistical showing alone, if sufficiently strong, will establish the requisite intent.[54/] A Title VII plaintiff may establish a prima facie case of disparate treatment using statistics alone if the statistics show a "gross disparity" in treatment of workers based upon a prohibited factor such as race. E.g. Hazelwood School District v. United States, 433 U.S. 299, 307-

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54/ Watson also introduced direct evidence of intent to discriminate, e.g., the comments of Gary Shipp to the effect that blacks could not handle large sums of money, Tr. I18-19, and the fact that as of 1973 no blacks were placed in positions of visibility to the Bank's customers. 798 F.2d at 808 (Goldberg, J., dissenting).

08 (1977). This Court has also held that a statistical showing of disparate treatment reaches this required level of "gross disparity" when the difference between the expected treatment and the actual treatment of a protected class is greater than two or three standard deviations. Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977); Hazelwood, 433 U.S. at 311 n.17. In contrast, a "marked disproportion" has been deemed sufficient to prove disparate impact, since intent is irrelevant. Rivera v. City of Wichita Falls, 665 F.2d 531, 535 n.5 (5th Cir. 1982). Watson's statistical evidence clearly met the prerequisite for a disparate treatment showing. The gross statistical disparities shown here, coupled with a subjective system which is inherently suspect, is more than sufficient to make such a case.

Here both anecdotal evidence and gross

racial disparities resulting from the use of subjective devices have been shown. However, when as in the instant case the statistical evidence is also finely tuned to the relevant labor pool, as opposed to the general population or workforce as relied upon in Teamsters itself, a lesser showing than that made here would permit an inference of intentional discrimination, see Segar v. Smith, 738 F.2d 1249, 1278 (D.C.Cir. 1984), cert. denied, 471 U.S. 1115 (1985) (citing B. Schlei & P. Grossman, Employment Discrimination Law 1371 (1983)). "[W]hen a plaintiff's statistical methodology focuses on the appropriate labor pool and generates evidence of discrimination at a statistically significant level, no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities." Id.

In order to dispel the inference of classwide disparate treatment which must be drawn in a case such as the instant one, an employer is required to show that the plaintiff's proof is "either inaccurate or insignificant." Teamsters, 431 U.S. at 360, or to provide a "nondiscriminatory explanation for the apparently discriminatory result". Id. at n.46. The employer's defense must be designed to meet the prima facie case presented by the plaintiff. Id.

Here, the bank made almost no effort whatever to rebut Watson's overwhelming statistical showing, 798 F.2d at 812 n.24, and indeed could not have, considering the overwhelming nature of Watson's statistical evidence. This is not a case where a plaintiff relied upon "naked comparison[s]" without regard to factors other than race which might have explained the disparate results. Pouncy v. Prudential Insurance

Co. of America, 499 F. Supp 427, 449 (S.D.Tex. 1980), aff'd, 668 F.2d 795, 802 (5th Cir. 1982). Watson presented sophisticated regression analyses which controlled for such factors. In any event, as Judge Goldberg noted, "[a]bsent proof to the contrary courts should decline to assume that blacks and whites do not possess the relevant qualifications in equal proportions." 798 F.2d at 812 (citing Payne v. Travenol, 673 F.2d 798, 822 (5th Cir. 1982); De Medina v. Reinhardt, 686 F.2d 997, 1008 (D.C. Cir. 1982)).[55/]

The Bank did, of course, articulate allegedly non-discriminatory reasons for denying Watson a promotion in each individual instance. Except for their internal

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55/ See also Teamsters, 431 at 339 n.20 ("absent explanation, it is ordinarily to be expected that non-discrimination will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired ...").

inconsistencies these excuses might have sufficed in an ordinary individual disparate treatment case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).[56/] However, the

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[56/] This case, of course, was not a classic McDonnell Douglas/Burdine individual disparate treatment case even though it might, in other circumstances, have been presented in that model. McDonnell Douglas is not "the only means of establishing a prima facie case of individual discrimination. [This Court's] decision in that case ... did not purport to create an inflexible formulation." Teamsters, 431 U.S. at 358 (emphasis in original.) Even under the McDonnell Douglas/Burdine model it is clear that the requirement of articulating a reason which is both "legitimate" and "non-discriminatory" has substantive connotations. The "legitimacy" of the conduct is to be judged to the extent by which it has "a rational and neutral business justification," McDonnell Douglas, 411 U.S. at 806 n.20. The bank did not demonstrate any business justifications for its subjective decisions (see supra). Second, the reason must be "applied alike to members of both races." Id. at 804. If the "assigned reason was ... discriminatory in its application," the defense fails. Id. at 807. Moreover, the non-discriminatory justification (subjective criteria here) cannot be said to be "non-discriminatory" if it operates disproportionately to burden blacks.

If nothing else, Watson's statistical evidence demonstrates that the Bank's proffered excuses for denying her promotions were pretextual.

classwide statistical showing made here was never adequately explained. In cases where a prima facie showing of classwide discrimination has been made, such unrebutted classwide statistical proof creates an inference of discrimination against individual class members, thus shifting the burden to the employer to show that individual class members were not victims of the proven pattern and practice of racial discrimination, Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976). As this Court stated in Teamsters:

> Although the prima facie case [does] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it [does] create a greater likelihood that a single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice chang[es] the position of the employer to that of a proven wrongdoer.

431 U.S. at 359 n.45.

In sum, even without reliance upon the disparate impact model, Watson and other minorities and women who are subjected to highly subjective employment selection criteria and who demonstrate through the use of statistics that these devices have in fact resulted in a gross disparity in their representation in the particular workforce generally, or in a particular salary or promotional level, may prevail under a disparate treatment model because discriminatory intent "can in some instances be inferred from the mere fact of difference in treatment," Teamsters, 431 U.S. at 335 n.15. This is such a case. If this "most obvious evil," id., is ever to be rooted out of our system, Title VII plaintiffs must not be deprived of the statistical tools to demonstrate the reality of the bias inherent in subjective selection devices.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

Deborah A. Ellis
Counsel of Record
Isabelle Katz Pinzler
Joan E. Bertin

American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036

Attorneys[57] for Amici Curiae

Dated:

New York, New York
September 14, 1987

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[57] Thanks are extended to Leticia Allen of Columbia University School of Law, Noemi Bonilla of Hofstra University School of Law and Laura Levine of Harvard Law School for their assistance on this brief.

APPENDIX

Statements of Interest of *Amici Curiae*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender-based discrimination. It has participated, both directly and as *amicus curiae*, in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices. The Texas Civil Liberties Union Foundation, the Texas affiliate of the ACLU, joins in this brief.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders

of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an

employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

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NO. 86-6139

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IN THE
SUPREME COURT OF THE UNITED STATES

* * * * * * * * *

CLARA WATSON,

Petitioner,

V.

FORT WORTH BANK AND TRUST,

Respondents.

* * * * * * * * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * *

BRIEF OF AMICI CURIAE STATE OF TEXAS AND TEXAS COMMISSION ON HUMAN RIGHTS; THE STATE OF ALABAMA; THE STATE OF HAWAII; THE COMMONWEALTH OF MASSACHUSETTS AND MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION; THE STATE OF NEW JERSEY; THE STATE OF OHIO AND OHIO CIVIL RIGHTS COMMISSION; THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS; THE STATE OF VERMONT; THE STATE OF WYOMING AND WYOMING DEPARTMENT OF LABOR, FAIR EMPLOYMENT DIVISION: IN SUPPORT OF PETITIONERS.

* * * * * * * * *

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Exec. Asst. Attorney General for Litigation

ON THE BRIEF:
ELAINE ROMBERG
Legal Intern

JAMES C. TODD
Chief, General Litigation Division

ATTORNEYS FOR AMICI CURIAE

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INTEREST OF THE AMICI CURIAE

The Texas Commission on Human Rights was established to enforce the Texas Commission on Human Rights Act,[1] which prohibits various forms of employment discrimination. This Texas statute is modeled after and very closely tracks the language of Title VII of the 1964 Civil Rights Act.[2] Indeed, the express purpose of the Texas Act is "to provide for the execution of the policies embodied in Title VII," including the objective of "secur[ing] for persons within the state freedom from discrimination in certain transactions concerning employment." *Id.* at §1.02. To fulfill this purpose, the Texas Commission on Human Rights is given enforcement powers comparable to those of the Equal Employment Opportunity Commission under Title VII. Given the close parallels in language and purpose between the Texas Commission on Human Rights Act and Title VII, it may be expected that Texas courts interpreting the state law are likely to be guided by this Court's construction of Title VII. Consequently, *amicus curiae* Texas Commission on Human Rights has a significant interest in this Court's decision in the instant case. For the reasons set out in this brief, the Commission is convinced that the application of disparate impact analysis to subjective employment criteria is essential for the eradication of illegal discrimination in the workplace.

In deciding to submit this *amicus* brief on behalf of the Texas Commission on Human Rights *et*

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[1] Vernon's Ann. Civ. Stat. Art. 5221k (1987).

[2] 42 U.S.C. §2000e et seq. (1982).

al., the Attorney General of Texas has also weighed the interests of the State of Texas as a major employer. The Attorney General of Texas is responsible for defending state agencies sued under Title VII. It is the view of *amici* herein that the marginal disadvantage to employers, if any, of easing the plaintiff's burden in cases alleging discrimination through subjective employment practices, does not outweigh the State's interest in the effective enforcement of anti-discrimination laws. As explained in part IV of this brief, the position advocated herein does not impose an onerous burden on employers.

It is time to recognize that state government throughout the nation has made impressive progress in eliminating discrimination from its own employment practices. While much remains to be done before full equality of opportunity is achieved, state government need not fear close scrutiny of its hiring practices[3] and vigorous enforcement of anti-discrimination laws.

The State of Texas is joined in this brief by: The State of Alabama (by and through the Honorable Don Siegelman, Attorney General); the State of Hawaii (by and through the Honorable Warren Price, III, Attorney General); the Commonwealth of Massachusetts and Massachusetts Commission Against Discrimination (by and through the Honorable James M. Shannon, Attorney General); the State of New Jersey (by and through

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[3] For example, while according to data compiled by the State Bar of Texas only 18% of lawyers licensed in Texas are female, 3.7% are Hispanic, and 1.6% are black, 39% of the approximately 260 attorneys employed by the Attorney General of Texas are female, 14% are Hispanic, and 9% are black.

the Honorable W. Cary Edwards, Attorney General); the State of Ohio and Ohio Civil Rights Commission (by and through the Honorable Anthony J. Celebreeze, Jr., Attorney General); the State of Rhode Island and Providence Plantations (by and through the Honorable James E. O'Neil, Attorney General); the State of Vermont (by and through the Honorable Jeff Amestoy, Attorney General); the State of Wyoming and Wyoming Department of Labor, Fair Employment Division (by and through the Honorable Joseph B. Meyer, Attorney General, and Mike Sullivan, Commissioner of Labor).

For each *amicus* state, as with the State of Texas, its Attorney General has balanced the interest of the state as employer and the state as protector of its citizens' right to be free from employment discrimination, and in each case has struck that balance in favor of the position argued herein. The *Amici Curiae* take no position on the merits of the present case but regard as crucial the ability of a plaintiff to try her case and have her proofs judged under the proper legal theories.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case as set forth by the Petitioner in the instant case.

SUMMARY OF ARGUMENT

Disparate impact analysis has been a vital tool in the eradication of employment discrimination since the Court established its use in 1971. In *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971), this Court recognized that an essential function of Title

VII[4] was to remove *all* barriers which denied women and minorities equal employment opportunities. To this end, the Court interpreted Title VII as proscribing not only intentional discrimination, but also employment practices that have discriminatory *effects*, regardless of an employer's intent in implementing them. *Id.*, at 431.

The application of disparate impact analysis in *Griggs* was not only an explicit recognition that discrimination could take many forms but further, it was an assertion that Title VII should attack employment discrimination in both its overt and more subtle forms. To realize the full extent to which Title VII can be used as a tool to root out discrimination requires a review of the historical treatment of Title VII case law. Although the early years of Title VII were characterized by cases involving overt, intentional discrimination, the later years have seen an increase in cases of more subtle and thus less identifiable discrimination. Disparate impact analysis, therefore, has been used not only to attack neutral policies that effectively but inadvertently discriminate against protected groups, but also to challenge those neutral policies which are in fact a pretext for intentional discrimination.

The use of subjective employment practices creates at least as much risk of inadvertent discriminatory effects as the use of objective practices. Moreover, subjective criteria offer an even more convenient pretext for intentional discrimination than their objective counterparts. The use of subjective criteria in hiring and promotion of employees, although not discriminatory *per se*, is nevertheless viewed suspiciously by most

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[4] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

courts. Reliance on subjective criteria leaves ample room for the operation of bias and prejudice, and should be examined closely by courts and used sparingly by employers. Disparate impact analysis under Title VII is an extremely valuable and necessary analytical tool for courts. It enables them to carefully scrutinize the use of subjective employment criteria once a plaintiff has demonstrated that such use has a disparate impact on a particular group. It would be a grave mistake, then, in light of Title VII's purpose of ending discrimination, to completely disallow the application of disparate impact analysis where it is needed most: to challenge inherently suspect subjective employment criteria.

Some would argue that it is unwise to subject an employer's subjective practices to the heightened scrutiny of disparate impact analysis. An employer may, however, assert the affirmative defense of business necessity when his or her practices are challenged as having a disparate effect. Although a showing of business necessity is a heavier burden than that which is borne by a defendant in a disparate treatment case,[5] it is not onerous. First, it is important to note that an employer is only required to make such a showing once a plaintiff has met his or her burden of equal weight: to demonstrate that the employer's practice has a disparate impact. Thus the employer's burden is not excessive when compared with that of the

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[5] A defendant employer in a disparate treatment case must merely articulate a legitimate, nondiscriminatory reason for taking a particular personnel action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

plaintiff-employee. Second, once a plaintiff demonstrates that an employer's subjective practices have a discriminatory effect on a particular group, both public policy and the spirit of Title VII favor asking the employer to explain and justify his or her procedures. Finally, a showing of business necessity to justify subjective employment practices does not involve the painstaking use of scientific validation techniques, as are frequently used in cases involving objective criteria. An employer need only demonstrate that the use of subjective criteria is necessary to his or her business. Such a showing is not onerous and is mandated by the clear purpose of Title VII: the abolition of *all* impermissible discrimination in employment.

ARGUMENT

I. INTRODUCTION

Title VII of the 1964 Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. 42 U.S.C. §2000e-2(a) (1982). An employee may prove employment discrimination under a theory of disparate treatment or one of disparate impact. In a disparate treatment case, a plaintiff alleges that she was treated less favorably by her employer based on her race, color, religion, sex, or national origin. The plaintiff must show that her employer *intended* to discriminate against her. *International Board of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1979). A discriminatory motive may be inferred, however, when a plaintiff shows she is a member of a protected class who was qualified and applied for a position for which the employer was seeking applicants, and failed to get that position, which remained open after her rejection. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973);

Texas Dept. of Community Affairs v. *Burdine*, 450 U.S. 248 (1981). The employer must then articulate a legitimate non-discriminatory reason for rejecting the plaintiff. Finally, the plaintiff may show that the employer's reason is in fact a pretext for intentional discrimination. *Id.*

In a disparate impact case, the elements are somewhat different. First, a plaintiff must show that one or more facially neutral employment practices have a disparate impact on a group of which she is a member. Proof of discriminatory intent on the part of the employer is not required. *Teamsters*, *supra*, at 335 n.15. After a plaintiff has made such a showing, the employer must justify the employment practices by showing that they are a "business necessity." *Griggs* v. *Duke Power Co.*, *supra*, at 431. Finally, a plaintiff may show that the employer's use of the employment practices was in fact a pretext for intentional discrimination. One way in which she may make such a showing is to demonstrate that there are satisfactory alternations which are less discriminatory. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

There are thus two major differences between the theories which render the disparate impact analysis a stronger weapon against discrimination. First, under the disparate impact theory, a plaintiff does not have to prove intent as part of her prima facie case. Second, after a plaintiff has demonstrated an adverse impact, the employer has to do more than merely *articulate* a legitimate, nondiscriminatory reason for the disparity. Rather, the employer must *prove* business necessity for the use of the employment practice which causes the disparate impact. These two differences make the disparate impact analysis a stronger tool with which courts may closely examine an employer's practices, once they have been shown to have had a discriminatory impact.

II. THE PURPOSE OF TITLE VII SUPPORTS THE APPLICATION OF DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT CRITERIA.

A. The statutory language of Title VII supports the application of disparate impact analysis to subjective employment criteria.

Section 703 (a)(2) of Title VII[6] provides that: It shall be an unlawful employment practice for an employer - ...

> (2) to limit, segregate, or classify his employees or applicants for employment *in any way* which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of race, color, religion, sex or national origin.

Title VII thus prohibits all forms of employment discrimination regardless of their subjective or objective nature. Both subjective and objective criteria can work to exclude a person that but for that criteria would be qualified to perform the job. There is nothing in the language of Section 703(a)(2) which draws a distinction between objective and subjective employment criteria; nor is there any language to suggest that discriminatory effects of subjective criteria should go unchecked. On the contrary, the language of Section 703(a)(2) indicates that Title VII is to be read broadly, covering a wide range of actions by an employer if such action has the effect of depriving an

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[6] 42 U.S.C. §2000e-2(1)(2) (1982), (emphasis added).

individual of employment opportunities or adversely affects his or her status as an employee.

The emphasis thus is on the effects of discrimination rather than on the causes of it. Discrimination clearly can be the *effect* of many subjective employment practices, regardless of an employer's intent in instituting them. It is evident from the expansive language of Title VII that subjective employment procedures, if they have discriminatory effects, constitute an unlawful employment practice. Disparate impact analysis should therefore be applicable in cases in which plaintiffs can demonstrate that his or her subjective criteria has a discriminatory effect on a group to which he or she belongs.

B. The purpose of Title VII as interpreted by this Court supports the application of disparate impact to subjective employment criteria.

In *Griggs v. Duke Power Co., supra*, this Court held that Congress had indeed directed the thrust of Title VII "to the *consequences* of employment practices, not simply the motivation."[7] The Court's holding as to the scope of Title VII in *Griggs* indicates a sensitive interpretation of the statute and an understanding of the problem it was intended to address.[8]

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[7] 401 U.S. 424, 432 (1971) (emphasis in the original).

[8] Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH.L.REV. 59, 63 (1972).

> The assumption underlying *Griggs* is that the Civil Rights Act of 1964 protects the interests of minority groups and their members in securing and improving employment opportunities. *Griggs* views discrimination not only as an isolated act by an aberrant individual wrongdoer that affects only an individual complainant, but also as the operation of industrial-relations systems that adversely affect group minority members.[9]

In *Griggs*, this Court validated the disparate impact analysis as a proper theory under which plaintiffs could challenge employment practices which have discriminatory effects.

Although *Griggs* dealt specifically with objective criteria[10] the opinion does not expressly limit disparate impact analysis to such criteria. It is important to note that throughout the *Griggs* opinion, the Court makes references to employment "practices" and "procedures"[11] and does not limit its discussion to objective criteria such as tests. The *Griggs* holding thus applies to all employment practices and procedures, not simply to isolated objective components.

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[9] *Id.*, at 62.

[10] *Griggs* involved the use of a facially neutral test.

[11] "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U.S. 424, 430 (1971).

This Court has never expressly limited disparate impact to objective criteria. The opinion in *Connecticut v. Teal*, 457 U.S. 440 (1982), in which the Court rejected the "bottom line" defense in disparate impact cases, did not distinguish between subjective and objective practices in terms of the applicability of disparate impact analysis.[12] Nor did the court expressly limit disparate impact analysis to objective criteria in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Although the Court did not apply the disparate impact analysis to subjective employment practices, it did not explicitly hold that disparate impact analysis would be inapplicable in such cases. Moreover, the plaintiffs in *Furnco* failed to make a showing of disparate impact, thus making use of the disparate impact analysis inappropriate in that case.[13]

C. The Congressional intent behind Title VII supports the application of disparate impact analysis to subjective employment criteria.

Three legislative goals of Title VII are evident from its legislative, social and political history.[14] As first proposed, the statute would have eliminated

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[12] 457 U.S. 440, 447 n.8.

[13] 438 U.S. 567, 571.

[14] Friedman, *Redefining Equality, Discrimination, and Affirmative Action Under Title VII: The Access Principle*, 65 TEX.L.REV. 41, 60 (1986).

race, color, religion and national origin as factors in employment decisions.[15] The House also added sex to the list of prohibited bases for employment discrimination.[16] Eliminating *intentional* discrimination was the first and most important goal of Congress in 1964. In fact, some members of the Senate were adamant that Title VII be limited to intentional discrimination and forced the addition of amendments which so limited the reach of the statute.[17] Senator Humphrey (D-Minn.), one of the main proponents of Title VII, felt that the addition of the amendments was unnecessary as the statute implicitly required intent.

> Since the title bars only discrimination because of race, color, religion, sex or natural [sic] origin it would seem already to require intent, and, thus, the proposed change does not involve any substantive change ... The express requirement of intent is designed to make it wholly clear that inadvertent or accidental discriminations will not violate the title...[18]

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[15] H.R. Rep. No. 914, 88th Cong., 2d. Sess. 2, *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS 2355, 2401.

[16] 110 CONG. REC. 2577-84, 2718, 2720-21 (1964).

[17] "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in unlawful employment practice charged in the complaint, the court may enjoin respondent..." 42 U.S.C. §2000e-5(g) (1982).

[18] 110 CONG. REC. 12,723-24 (1964).

With that goal in mind, Congress passed Title VII of the 1964 Civil Rights Act.

A review of the legislative history behind the 1972 amendments to Title VII reveals a second goal. By 1971, Congress began considering amendments to Title VII. Many Congressmen had increased their understanding about employment discrimination, its victims, and how to eradicate it.[19] Thus was clarified a second goal of Title VII: the eradication of the discriminatory effects of employment practices regardless of employers' intent.

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment practices tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization...
>
> Employment discrimination, as we know it today, is a more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs...[20]

Congress saw the need for and approved the use of the disparate impact theory.

> A recent striking example was provided by the Supreme Court in *Griggs*...where the Court held that use of employment

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[19] Note, *Applying Disparate Impact Theory to Subjective Employee Selection Procedures*, 20 LOYOLA OF LOS ANGELES LAW REVIEW 323, 386 (1987).

[20] H.R. Rep. No. 238, 92d Cong., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS at 2144.

> tests, even when nondiscriminatory and applied in good faith by the employer, was a violation of Title VII if such tests work a discriminatory effect in hiring patterns ... *Id.*

The Senate Committee in fact endorsed the use of the disparate impact theory by the Civil Service Commission to reexamine its entire rehiring and promotion procedures.[21]

The final goal of Title VII was to minimize government interference with "traditional management prerogatives."[22] This final goal of trying to preserve employer autonomy may not always be consistent with the other two statutory goals.[23] To preserve employer autonomy completely

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[21]"It is in these and other areas where discrimination is institutional, rather than merely a matter of bad faith, that corrective measures appear to be urgently required. For example, the Committee expects the Civil Service Commission to undertake a thorough reexamination of its *entire* testing and a *qualification* program to ensure that the standards enunciated in the *Griggs* case are fully met." S. Rep. No. 415, 92d, Cong., 1st Sess. (1971) (emphasis added).

[22]Friedman, *supra* at 61. *See Local 93, International Assoc. of Firefighters v. City of Cleveland*, _____ U.S. _____; 106 S.Ct. 3063, 3075 (1986).

[23]"Not unexpectedly, the implementation of Title VII has uncovered profound tensions by attempting simultaneously to wipe out discrimination while minimally disrupting private decision making."

(Footnote Continued)

would be to allow employers absolute discretion in their employment practices, to hire, terminate and promote at will, based on race, sex, performance or any other standard. Exercise of such discretion is not tolerated when it operates to discriminate against women or minorities. As a matter of public policy some practices must be prohibited regardless of whether the prohibition interferes with "traditional management prerogatives." For example, compare the proscription of discrimination in public accommodation. Title II of the Civil Rights of 1964, 42 U.S.C. §2000a (1982); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 257, 259-261 (1964). By definition, a prohibition against employment discrimination such as Title VII must interfere with "traditional management prerogatives" to the extent that those prerogatives discriminate. To be sure, the freedom of employers to freely conduct their businesses must be preserved. Their freedom ends, however, and must be enjoined, when it infringes on an employee's right to be free from discrimination based on her race, color, religion, sex or national origin. The overriding purpose of Title VII is to end discrimination. "It is abundantly clear that Title VII tolerates no discrimination, subtle or otherwise." *McDonnell Douglas v. Green, supra*, at 801.

Although judicial examination of employers' subjective practices interferes somewhat with their "traditional management prerogatives," it does so only to the extent that those prerogatives inadvertently or intentionally are used to

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(Footnote Continued)
Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L.REV. 305, 306 (1983).

discriminate. Judicial interference takes place only after there has been a prima facie showing that an employer's practices have had a discriminatory effect on a particular group.[24] At that point, such an intrusion is warranted and even mandated by the purpose of Title VII. It is essential to the fulfillment of the explicit goal of Congress in enacting Title VII that courts be allowed to use the most effective tools to attack employment discrimination. Disparate impact is such a tool, and should be used in the examination of subjective criteria if they adversely impact the employment of women and minorities.

D. The agencies charged with enforcement of Title VII apply disparate impact analysis to subjective employment criteria.

In 1978, Title VII's four enforcement agencies[25] jointly issued the *Uniform Guidelines on Employee Selection Procedures*. 29 C.F.R. §1607.1.A (1985). The 1978 *Guidelines* strengthened the agencies' regulations with respect to disparate impact analysis by stating that any "procedure having adverse impact constitutes discrimination unless justified." 29 C.F.R. §1607.3.A. (1985).

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[24] *Albemarle, supra*, at 425 (saying that an employer's burden to prove business necessity to the court's satisfaction only arises after a plaintiff makes a prima facie showing that the employment practices have a disparate impact).

[25] The Equal Employment Opportunity Commission (EEOC), the Department of Justice, the Department of Labor, and the Civil Service Commission.

They also defined the employment procedures to which adverse impact analysis was applicable as including subjective criteria.

> Selection procedures includes the full range of assessment techniques, from traditional paper and pencil tests ... through *informal or casual interviews and unscored application forms*. 29 C.F.R. §1607.16.Q (1985) (emphasis added).

Through these *Guidelines*, the EEOC and other enforcement agencies have announced their view that the law requires application of the disparate impact model to all selection procedures, objective or subjective. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1483 (9th Cir. 1987).

Such agency regulations are entitled to "great deference," and can be treated as "expressing the will of Congress." *Griggs, supra* at 434.[26] Enforcement agencies such as the EEOC are no doubt intimately familiar with the workings of the statute, and have a uniquely accurate view of where discrimination may be found. Their views of the law reflect their experience in the real world of employment discrimination and should be accorded great weight by courts. In this case, the EEOC has obviously found that discrimination can result from *all* employment procedures, and applies disparate impact to both objective and subjective criteria. Its conclusion springs from years of processing thousands of discrimination claims and should be accorded "great deference" by this Court.

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[26] *See also Albemarle Paper Co. v. Moody, supra*, at 431; *Atonio v. Wards Cove Packing Co., Inc., supra*, at 1483; *Griffin v. Carlin, supra*, at 1525.

E. To hold that disparate impact analysis is not applicable to subjective employment criteria would frustrate the purpose of Title VII.

One of the consequences of prohibiting the use of adverse impact analysis to challenge subjective employment practices would undoubtedly be to encourage the use of such practices.

> Exclusion of such subjective practices from the reach of the disparate impact model of analysis is likely to encourage employers to use subjective, rather than objective, selection criteria. Rather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions. It could not have been the intent of Congress to provide employers with an incentive to use such devices rather than validated objective criteria.

Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985). An employer could effectively immunize himself from the more exacting scrutiny of a disparate impact challenge merely by adopting subjective employment practices. "If an employer cannot be challenged for an employment policy which is a subjective mix of a variety of factors, that is the type of system the employer will create."[27] Congress could not have intended to encourage the use of employment criteria that are

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[27] Note, *Application of the Adverst Impact Analysis to Subjective Criteria in Title VII Employment Discrimination Cases*, 38 BAYLOR LAW REVIEW, 363, 381 (1986).

inherently suspect, and that can easily be used to mask intentional discrimination. Encouraging the use of subjective criteria by limiting the reach of disparate impact analysis would subvert the clear intent of Congress in enacting Title VII.

One of the purposes of enacting Title VII was to encourage employers to take it upon themselves to evaluate their own employment practices. Title VII:

> provides the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

Albemarle, supra, at 417-418. This purpose of Title VII would clearly be undermined if this Court were to hold that disparate impact analysis was not applicable to subjective criteria. Instead of encouraging employers to examine their practices in order to eliminate the vestiges of discrimination, it would allow employers to practice discrimination under the guise of subjective employment practices. A policy which is further away from Congress' intent in enacting Title VII can hardly be imagined.

Finally, Congress intended Title VII, especially the 1972 amendments, to attack discrimination in both its overt and more subtle forms. The disparate impact model is an invaluable tool in the eradication of discrimination in its more subtle form.

> Once these employment practices with differential impact have been brought into the open, *no sound policy reason exists for refusing to apply traditional disparate impact analysis to them*. Indeed, application of disparate impact in this situation speeds the day when we will

> have rid ourselves of discrimination in its subtle as well as its crass aspect.

Segar v. Smith, 738 F.2d 1249, 1271 n.18 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985) (emphasis added). Although the early years of Title VII were characterized by cases of blatant, overt and intentional discrimination,[28] recent cases more often involve inadvertent or more subtle forms of discrimination. "The overt and blatant bigotry that marked the leading civil rights cases of an earlier year seldom supplies the gravaman of cases which now reach the appellate courts." *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1013 (D.C. Cir. 1981). In short, racism and other forms of discrimination have gone underground. As is the case with any law, people have found a way to circumvent Title VII, masking racism and the like in the form of employment criteria, objective and subjective. Not allowing the application of the disparate impact model to both objective and subjective practices would thwart the purpose behind Title VII, and allow subtle discrimination to go unchecked. This was not the purpose behind Title VII and should not be supported by this Court.

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[28] "It was the more conspicuous forms of intentional discrimination that animated the legislative initiative in 1964, and in the first decade after Title VII's enactment occupied the energy and time of the courts and of the EEOC." Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 U.C.L.A. L.REV. 305, 310 (1983).

III. THE MAJORITY OF CIRCUIT COURTS APPLY DISPARATE IMPACT ANALYSIS TO SUBJECTIVE EMPLOYMENT CRITERIA

The Second, Third, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits apply disparate impact analysis to subjective practices and criteria.[29] The Fourth, Seventh and Eighth Circuits have reached conflicting results.[30] The

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[29] *See e.g., Zahorik v. Cornell University*, 729 F.2d 85 (2d Cir. 1984); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir. 1983); *Rowe v. Cleveland Pneumatic Co., Numerical Control Inc.*, 690 F.2d 88 (6th Cir. 1982); *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987); *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985); *Coe v. Yellow Freight Systems, Inc.*, 646 F.2d 444 (10th Cir. 1981); *Griffin v. Carlin*, 775 F.2d 1516 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

[30] *EEOC v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) (stating that disparate impact analysis could only be applied to objective practices); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed pursuant to Sup.Ct.R. 60*, 404 U.S. 1006 (1971) (applying disparate impact analysis to use of a seniority system that was at least partially subjective); *Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986) (refusing to apply disparate impact analysis) *contra Clark v. Chrysler Corp.*, 673

(Footnote Continued)

Fifth Circuit, from which this case originates, has also reached conflicting results. In earlier cases, the court, relying on *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972), applied disparate impact analysis to subjective criteria. In more recent cases, however, the court has relied on *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), in refusing to apply disparate impact analysis to subjective criteria. Recently, the Fifth Circuit did apply the theory to subjective practices, in accord with *Rowe*. In *Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir. 1984), the court applied disparate impact analysis because "promotional systems which depend upon the subjective evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for discrimination." *Id.*, at 1054.

The majority of courts apply disparate impact analysis to subjective criteria. The remaining courts have all applied it at one time, but now have reached conflicting results. Not one circuit court has consistently refused to apply disparate impact analysis to subjective criteria.

A. The use of subjective employment criteria is viewed suspiciously by courts as a convenient pretext for discrimination, and thus warrants the application of disparate impact analysis.

(Footnote Continued)
F.2d 921 (7th Cir.) *cert. denied*, 459 U.S. 873 (1982); *Talley v. United States Postal Service*, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (refusing to apply disparate impact analysis) *contra Gilbert v. Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984).

Most circuit courts view the use of subjective criteria by employers suspiciously, as a ready mechanism for discrimination.[31] "We have repeatedly held that subjective practices such as interviews and supervisory recommendations are capable of operating as barriers to minority advancement." *Griffin v. Carlin, supra* at 1525. Of particular concern to the courts are cases in which the subjective evaluations are made of minority employees by white supervisors. "This Court and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." *Crawford v. Western Electric Co., supra*, at 1316. Such concern illustrates the fear that many courts have when they consider the ease with which employers can mask racial bias with subjective employment practices.

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[31] *Atonio v. Wards Packing Co., Inc., supra*, at 1484 (9th Cir. 1987); *Griffin v. Carlin, supra* at 1525 (11th Cir. 1985); *Williams v. Colorado Springs, Colo. Sch. Dist.*, 641 F.2d 835, 842 (10th Cir. 1981); *Crawford v. Western Electric Co.*, 614 F.2d 1300, 1315 (5th Cir. 1980); *Grant v. Bethleham Steel Corp.*, 635 F.2d 1007, 1016 (2d Cir. 1980); *Davis v. Califano*, 613 F.2d 957, 965-966 (D.C. Cir. 1979); *Abrams v. Johnson*, 534 F.2d 1226 (6th Cir. 1976); *Barnett v. W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975); *Muller v. U.S. Steel Corp.*, 509 F.2d 923, 928 (10th Cir.), *cert. denied*, 423 U.S. 825 (1975); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir.), *vacated* 423 U.S. 809 (1975); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

Considering that subjective employment practices are inherently suspect, the use of the disparate treatment analysis to examine them is clearly appropriate. The majority of the circuit courts agree, and in fact apply impact analysis to cases involving purely discretionary and subjective decision-making by employers and their supervisors.[32] Under the disparate treatment model, an employer would merely be required to *articulate* a legitimate, nondiscriminatory reason for the adverse impact of the subjective employment practice. Under the disparate impact model, however, an employer would have to *justify* his or her use of subjective criteria as a business necessity. Disparate impact is therefore a more stringent examination of an employer's practices and is appropriate when these practices are inherently suspect, as subjective criteria are.

IV. BUSINESS NECESSITY IS NOT AN ONEROUS BURDEN FOR EMPLOYERS.

The Supreme Court first articulated the business necessity defense in *Griggs v. Duke Power Company, supra*. In that case, this Court used "business necessity" and "job-relatedness" interchangeably, and defined the burden as a "showing that any given requirement must have a manifest relationship to the employment in question." *Griggs, supra* at 432. In *Albemarle Paper Co. v. Moody*, this Court said that an employer has a legitimate interest in "efficient and trustworthy workmanship," 422 U.S. 405 at 425, thereby suggesting that an employment practice, to

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[32] *Supra*, note 11.

be justified, must be related to that interest. In *Dothard v. Rawlinson*, the Court stated that "a discriminatory employment practice must be shown to be necessary to the safe and efficient job performance to survive a title VII challenge." 433 U.S. 321 at 331 & n.14 (1977). Circuit courts and legal commentators have further clarified the scope of business necessity.

As the Ninth Circuit has held, "precisely what the employer must prove will vary with the factors of different job settings." *Atonio, supra* at 1486. Two prominent legal scholars in employment law have said that "business necessity" and "job-relatedness" are not interchangeable terms. "Job-relatedness is one, but not the exclusive, means of establishing business necessity."[33] The circuit court decisions support such a distinction. Job-relatedness is but one of the two standards which have emerged from the circuit court decisions as ways to prove business necessity. The second standard is one of safety and efficiency. "As it has worked out in the lower courts, the job-relatedness language is usually applied to testing and academic requirements, while the safety and efficiency language is generally applied to other employment practices." *Williams v. Colorado Springs, Colo. Sch. Dist., supra*, at 841, n.2.

Basically, an employer should have to prove that his or her use of subjective employment criteria is a business necessity. "The term 'necessity' connotes that the exclusionary practice must be shown to be of great importance to job performance..." *Id.* Additionally, an employer should have to prove that the characteristics for

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[33] Schlei and Grossman, EMPLOYMENT DISCRIMINATION LAW (2nd Ed. 1983) at 114.

which he or she subjectively evaluates the applicants are related to the effective operation of the business. Finally, "there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser discriminatory racial impact." *Id.*, quoting *Robinson v. Lorillard Corp., supra* at 798. In order to satisfy this final part of the business necessity showing, employers would merely have to show that other practices, such as more objective criteria, would not serve their business purpose as well as their present criteria.

There have been and will be cases in which subjective criteria survive a disparate impact challenge. One such case involved the process by which tenure decisions were made by a university. In *Zahorik v. Cornell University, supra*, although the plaintiff failed to prove disparate impact, the court discussed the business necessity of using a highly subjective process. It said that even though the process by which tenure decisions were made was very subjective, the process was job-related. 729 F.2d 85 at 96. Many jobs, especially white collar, professional and supervisory jobs, often require at least some degree of subjective evaluation. When such criteria is challenged for disparate impact, an employer should have to show: (1) that the effective operation of the business requires subjective criteria; (2) that the characteristics for which the applicants are subjectively evaluated are related to the business purpose; (3) and that the business could not be as effectively operated with the use of different criteria which have a less discriminatory impact.

A showing of business necessity is not an onerous burden for employers to bear for a number of reasons. First and foremost is the fact that an employer does not have to show business necessity until after a plaintiff has established that the

employment practices of the employer have a discriminatory impact. "This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, ..*e*. has shown that the [practices] in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Albemarle, supra* at 425. The employer's burden vests only after the plaintiff has met her burden of at least equal weight. As the Ninth Circuit recently pointed out:

> The burden of proof on the employer is commensurate with the greater burden on the plaintiff to prove impact and to establish the causal connection between the practices and the impact. Once a challenged practice which causes disparate impact is identified, it does not place an unfair burden to ask an employer to justify the challenged practice.[34]

Business necessity, therefore, is not an onerous burden for an employer to bear in light of the substantially equal burden that rests with the plaintiff in an adverse impact case.

Moreover, once a plaintiff has met her burden in an adverse impact case, such a strong showing of discrimination cries out for an equally strong justification. "The hard, cold statistical record of impact provides a stronger circumstantial case of discrimination than a subjective claim of improper motivation." *Grant v. Bethlehem Steel Corp., supra* at 1015. To force an employer to justify the use of an employment practice once that practice

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[34] *Atonio v. Wards Cove Packing Co., Inc., supra,* at 1486. *See also Segar v. Smith, supra,* at 1271.

has been shown to have a statistically disparate impact does not impose too heavy a burden.

A showing of business necessity by the employer is not too onerous a burden considering that the employer is in the best position to make such a showing.

> The employer will possess knowledge far superior to that of the plaintiff as to precisely how its employment practices affect employees. This fact, as the Fifth Circuit noted in *Pouncy*,[35] 668 F.2d at 801, traditionally justifies placing on the defendant the burden of proving business necessity of an employment practice.[36]

The Ninth Circuit has said that in its view, proving business necessity is not more onerous in cases involving subjective criteria, simply because the employer has the superior knowledge of "what his practices are and why he uses the methods and criteria he does, ... [and] precisely how his employment practices affect employees." *Atonio, supra*, at 1486. Asking an employer to open up his or her practices, to explain and to justify them after they have been shown to have a discriminatory effect, does not impose an unreasonable burden.

CONCLUSION

The clear purpose behind Title VII was to end discrimination in whatever form it might take.

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[35] *Pouncy v. Prudential Insurance Company of America, supra.*

[36] *Segar v. Smith, supra.* at 1271.

Disparate impact analysis is an effective and essential tool available to courts in examining an employer's practices. To immunize subjective employment practices from the exacting scrutiny of disparate impact analysis would be to subvert the explicit purpose behind the enactment of Title VII. Adverse impact analysis should be available to challenge any employment criteria that have been shown to have a discriminatory impact. Only in this way can our society ever hope to overcome the legacy of social, political and economic subjugation suffered by women and minorities which has in the past, frustrated, and continues today to frustrate, their attempts to compete with others on an equal basis.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant
Attorney General for
Litigation

ON THE BRIEF:
ELAINE ROMBERG
Legal Intern

JAMES C. TODD
Chief, General Litigation
Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2120

ATTORNEYS FOR AMICI
CURIAE

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, as of the 14th day of September, 1987 to the following counsel of record at the addresses indicated:

Art Brender
Brender, Casey & Colosi
930 Capital National Bank Bldg.
110 W. 7th at Houston
Fort Worth, Texas 76102

Mr. Bruce W. McGee
Gandy, Michener, Swindle,
Whitaker & Pratt
2501 Parkview Drive, STE 600
Forth Worth, Texas 76102

James C Todd

JAMES C. TODD
Assistant Attorney
General

(15)

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No. 86-6139

In the Supreme Court of the United States

OCTOBER TERM, 1986

CLARA WATSON,
Petitioner,

vs.

FORT WORTH BANK & TRUST,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

JERALD L. HILL
MARK J. BREDEMEIER
Counsel of Record
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Counsel for Amicus Curiae
Landmark Legal Foundation

November 9, 1987

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation* is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights. The Foundation, through original action litigation and amicus curiae briefs, has supported the rights of individual and corporate employers and individual employees to freely contract and interact in such a way as to promote the principle of free enterprise. Moreover, during the October, 1986 term, the Foundation filed with the Court

*Landmark Legal Foundation recently changed its name from Gulf and Great Plains Legal Foundation.

a Petition for Writ of Certiorari in the case of *The Rath Packing Company Creditors' Trust, etc. v. Equal Employment Opportunity Commission*, No. 86-67. Although the Court denied this petition, several of the issues presented therein survive in the case *sub judice*.

Landmark, as Gulf and Great Plains, has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this case.

SUMMARY OF ARGUMENT

This Court has developed two basic models of analysis to be applied in employment discrimination lawsuits brought under Title VII: the "disparate treatment" analysis and the "disparate impact" analysis. The former generally has been applicable to situations where the employer utilizes some subjective criteria in hiring or promotion decisions and the latter applicable to situations where the employer utilizes some objective, facially neutral criteria in deciding who to hire or promote.

Since its decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court has uniformly applied the disparate treatment analysis to subjective employment practices like those utilized by Fort Worth Bank & Trust in this case. If the Court were to hold for Petitioner in the present case, and apply the disparate impact analysis to the bank's subjective hiring practices, it would represent a bold and unwarranted deviation from sixteen years of precedent.

The disparate impact analysis of *Griggs*, from a practical standpoint, is simply not appropriate for subjective employment practices. It focuses on the *effect* of some employment practice. Disparate treatment, however, focuses on the *intent* of the employer when hiring or promoting rather than more generalized results of employment practices. In short, disparate impact is concerned with some adverse effect of employment practices on a particular group of applicants while disparate treatment looks for discriminatory animus on the part of the employer.

While private employers should not be permitted to base hiring or promotion decisions on race or sex alone, they should be given some discretion in deciding who to employ. If the *Griggs* disparate impact analysis is applied to subjective employment decisions, then employers will lose a great deal of this necessary discretion. Title VII plaintiffs can and will bring suit successfully without showing any discriminatory intent on the part of the employer. Meanwhile, the employer will feel inclined to hire a certain number of employees based primarily on their race or sex to avoid any appearance of using employment practices which adversely affect certain groups. As a result, the employer would have less discretion in hiring or promoting employees based upon sound business judgment relating to quality, productivity and so forth.

ARGUMENT

I.

THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY REJECTED APPLICATION OF THE DISPARATE IMPACT ANALYSIS TO AN EMPLOYER'S PURELY SUBJECTIVE EMPLOYMENT PRACTICES.

The disparate impact doctrine of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is not applicable to subjective employment practices. In light of Supreme Court precedent, such an application cannot withstand sound legal reasoning. Furthermore, public policy interests are best served if the disparate impact analysis is not stretched to fit subjective hiring and promotion criteria.

A. The Supreme Court Has Consistently Applied The Disparate Treatment Analysis, Rather Than The Disparate Impact Analysis, To Subjective Employment Practices.

The Court has made several rulings concerning the disparate treatment and disparate impact doctrines. These rulings have uniformly applied the disparate treatment analysis to subjective employment practices and the disparate impact analysis to facially neutral, objective employment practices. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the employer did not rehire a black man because he had intentionally violated the law to disrupt company operations. Since there was no objective, standardized hiring criteria at issue, but rather the subjective decision of an employer, the Court applied the disparate treatment analysis and looked for evidence that

the decision not to rehire was pretextual or for some indication of discriminatory intent. Similar reasoning was used in *Teamsters v. U.S.*, 431 U.S. 324 (1977). There, the defendant labor union was charged with facially discriminatory hiring and promotion practices at its Nashville terminal. The Court applied the disparate treatment theory and found the union guilty of systematic and purposeful employment discrimination.

The Court again analyzed subjective hiring practices according to *McDonnell Douglas* in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). The Court noted that under Title VII an employer is prohibited "from having as a goal a work force selected by any proscribed discrimination practice." *Furnco Construction*, 438 U.S. at 577. This language indicates that the Court was looking for evidence of discriminatory intent. In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the disparate treatment theory was again applied to the employer's subjective, discretionary hiring practices. The Court followed the *McDonnell Douglas* analysis very closely and noted that a hiring decision may not be "based upon unlawful criteria" which reveals some discriminatory animus. It is clear that where the challenged employment decisions are based upon some subjective, discretionary criteria the proper burden is proof of disparate treatment, which requires some showing of discriminatory intent.

The disparate impact analysis, on the other hand, has consistently been followed in cases involving hiring or promotion practices which are based on some objective, facially neutral criteria which is applied to all applicants regardless of race or sex. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the employer required a high school diploma and a passing score on certain standardized intelligence tests. The Court applied the disparate impact

analysis and looked to see if the objective criteria were related to successful job performance. It held that under Title VII employment or promotion decisions may not be based on testing or measuring procedures alone unless the procedures are demonstrated to be a reasonable measure of job performance. The Court stated that if "an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. Under *Griggs*, a showing of discriminatory intent is not required since the challenged practices are objective and facially neutral.

The primary concern in disparate impact cases is whether the employer can show a correlation between the objective criteria and job performance or some clear business necessity. *See Connecticut v. Teal*, 457 U.S. 440 (1982). In *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court applied the *Griggs* disparate impact analysis. At issue were two standardized exams which the paper company utilized in order to determine which employees were to be promoted. The plaintiffs were successful because the company failed to show that the exam scores of employees were related to the quality of their job performances. In *Washington v. Davis*, 426 U.S. 229 (1976), the District of Columbia police department required all applicants to take a standardized written exam. The test was racially neutral on its face but a higher percentage of blacks than whites failed the exam. The Court based its decision on the Fifth and Fourteenth Amendments, but also noted that even under a Title VII disparate impact theory the defendant would prevail since the written exams were sufficiently related to job performance. *Id.* at 249 (citing *Griggs* and *Albemarle Paper Co.*). It is only in the instances where facially neutral, objective employment practices are challenged that the Court has applied the disparate impact theory.

B. From A Practical Standpoint, The Disparate Impact Model Cannot Be Appropriately Applied To Subjective Employment Practices.

The disparate impact analysis looks to the effects of employment practices on certain protected groups. Disparate treatment, however, focuses on the intent of the employer. Disparate impact requires that the employer show some connection between the objective criteria and job performance. Hence, the impact theory is inapplicable where subjective employment criteria are utilized because no neutral, objective employment requirement is present which the employer can show is connected to to job performance. *See* B. Schlei & P. Grossman, *Employment Discrimination Law* 1289 (2d ed. 1983). Because each form of analysis has a very different focus, the two can only be applied under the proper circumstances. As one commentator has noted:

> While disparate impact analysis is well suited to cases in which neutral, objective tests are challenged because the discriminatory effects of such tests can be measured without reference to intent, it is ill suited to cases in which subjective evaluations are made because the discriminatory effects of these evaluations ultimately must be measured by inquiring into intent, which inquiry is properly done under disparate treatment analysis.

Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 552 (1986). Impact theory and treatment theory are each tailored to be applied to very different types of employment practices. It would be futile to apply either theory to a factual situation where it was not designed to be applied.

These competing theories require different methods of proof. Under disparate impact, the employer must show some business necessity for the challenged practice. Under disparate treatment, the employer need only show some legitimate, nondiscriminatory reason for the challenged hiring decision. Applying disparate impact to an employer's subjective hiring or promotion decisions would put that employer in the untenable position of having to show that an individual was hired or not hired due to a business necessity. This simply is an illogical and unfair burden of proof to force upon the employer.

C. Application Of The Disparate Impact Analysis To The Subjective Employment Practices Of Private Employers Would Effectively Strip Those Employers Of Necessary Discretion In The Selection And Promotion Of Employees.

Private employers, including those owning small businesses, are entitled to broad discretion in choosing who to hire or promote. This freedom, which is intended to encourage creativity, productivity, quality and competition, is a hallmark of the American free enterprise system. It is not the right of private employers to discriminate in their hiring or promotion decisions on the basis of race or sex. However, in the quest to preserve equal employment opportunity, the ownership rights of small business owners and other private employers must not be slighted. If the disparate impact analysis is applied to subjective employment decisions of employers, these rights will be slighted in that much of the necessary discretion in choosing who to hire or promote will be taken away.

The pertinent section of Title VII provides that it is unlawful for an employer "to fail or refuse to hire or

to discharge any individual . . . because of such individual's race, color, religion, sex or national origin," and it is also unlawful "to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities." 42 U.S.C. §2000e-2(a). The phrase "deprive or tend to deprive" indicates that Congress was mindful of employment practices which might result in an unfair disparate impact upon certain groups. Federal regulations require that employment selection procedures which have an "adverse impact" on protected groups of employees or applicants be "validated." 29 C.F.R. §1607.3 (1986). It is apparent that Congress has recognized the possibility of injustice under the guise of objective hiring or promotion criteria and this Court has fashioned the disparate impact theory to ensure that objective criteria are not utilized to unjustly discriminate.

Small business owners hire and promote individuals based on their perception of who will most benefit the business. If no neutral, objective criteria are used by the owner, then the decisions are purely subjective, based on the personal feelings of the owner-employer. In deciding which employees or applicants will be most productive, the employer may consider various characteristics of each individual, some of which may be intangible and difficult or impossible to qualify. Yet, if the disparate impact analysis is applied to these subjective decisions, the employer will be forced to do the impossible—qualify and explain employment decisions which were based on unqualifiable business acumen and instincts. Since it would be impossible for the owner-employer to meet the "business necessity" requirement of the disparate impact theory, he could be successfully sued for doing little more

than exercising personal discretion in running his own business. Consequently, employers would feel compelled to curtail the exercise of their hiring and promotion discretion for fear of liability to potential Title VII plaintiffs. Small business owners should not be chilled or discouraged from enjoying their freedom to hire employees who, in the opinion of the employer, will most benefit the business. The hiring and promotion discretion of small business owners and other private employers must be preserved. In our fervor to ensure equal opportunity of employment, a fervor which is certainly well-placed, we should not trample upon the rights of small business owners to run their businesses to the best of their ability.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fifth Circuit should be affirmed to the extent it rejects application of the disparate impact analysis to an employer's subjective employment practices.

Respectfully submitted,

JERALD L. HILL
MARK J. BREDEMEIER
Counsel of Record
LANDMARK LEGAL FOUNDATION
15th Floor
1006 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6600
Counsel for Amicus Curiae
Landmark Legal Foundation

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, THE INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION AND THE EMPLOYMENT MANAGEMENT ASSOCIATION AS AMICI CURIAE SUPPORTING RESPONDENT

Of Counsel:

BREED, ABBOTT & MORGAN

*LAWRENCE Z. LORBER
J. ROBERT KIRK
1875 Eye Street, N.W.
Suite 1000
Washington, D.C. 20006

Attorneys for Amici Curiae, American Society for Personnel Administration, International Personnel Management Association, and Employment Management Association

*(*Counsel of Record)*

November 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964 require that a final managerial judgment to promote an individual employee be supported by the same complex proof of job relatedness required for standardized selection protocols that systematically deny employment opportunities to a disproportionately high number of the members of protected groups?

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Consent to Filing

This amicus brief is filed pursuant to Supreme Court Rule 36.2, with the written consent of all parties. Letters of consent have been filed with the Clerk of this Court.

Interest of the Amici Curiae

The American Society for Personnel Administration ("ASPA") is the world's largest association of personnel and human resources professionals, representing over 36,000 members in business, government, and education dedicated to the furtherance of personnel and human resource management. Accordingly, ASPA and its members have a keen interest in the orderly development and enforcement of the myriad laws and regulations which govern many aspects of employment.

The International Personnel Management Association ("IPMA") represents more than 1,000 public sector agencies including civil service commissions, merit system boards and personnel departments at the federal, state and local levels of government. The Association represents over 55,000 individuals, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop interest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

The Employment Management Association ("EMA") is a private, non-profit organization comprised of employment and human resources executives representing many of the nation's top companies and institutions. Through newsletters, advisory bulletins, research reports, publications, regional meetings and national conferences, EMA members analyze and discuss subjects of vital interest to the employment community. EMA seeks to create an awareness of today's critical employment problems and help develop meaningful solutions.

As the major associations of the human resources profession, ASPA, IPMA and EMA are vitally concerned with the orderly development of the law defining, in practical terms, the meaning of equal employment opportunity. ASPA, IPMA and EMA have long recognized their special responsibility to support and encourage compliance with fundamental principles of equal employment opportunity in the administration of efficient, workable personnel management systems. ASPA, IPMA and EMA believe that the present case provides the proper vehicle for this Court to reaffirm the appropriate balance between the compatible goals of providing equal employment opportunities and preserving the right of managers to make legitimate personnel judgments in the best interest of their organizations.

Statement of Facts

Clara Watson, a black woman, was hired as a proof operator by Fort Worth Bank & Trust (the "Bank") in August 1973. In January 1976, Watson was promoted to the position of teller in the Bank's motor bank. Watson was promoted once again in February 1980, this time to the position of commercial teller in the Bank's main lobby. (J.A. 205) That same month, Watson sought a further promotion to the position of supervisor of all the Bank's tellers. However, the position was awarded to another employee who already supervised the Bank's bookkeeping department. During the following year, Watson applied unsuccessfully for promotions to three other supervisory positions. (J.A. 205-6) In two instances, an employee with substantially greater experience, Ms. Pat Cullar, was selected over Watson, first for the position of supervisor of motor bank tellers and later for the position of supervisor of lobby tellers. In the other case, the supervisory position sought by Watson was awarded to a person who was strongly recommended by the person vacating the position and who, unlike Watson, had at least some supervisory experience. (J.A. 190-194, 196-7)

The evidence showed that other than the Bank's decisions concerning Petitioner, on only one occasion had a black person applied for a promotion that was awarded to a white. (J.A. 201)

Each of the Bank's promotion decisions—both the decisions that produced two promotions for Petitioner and the decisions about which Petitioner complains—was the product of a promotion process which is used in literally every American workplace. When a vacancy occurred, the Bank manager who would be supervising the new incumbent judged the mix of qualifications presented by competing applicants and selected the candidate he or she believed would be best for the job. A variety of factors were considered by the Bank's managers, including experience, job knowledge, productivity, ambition and personal relations between supervisor and applicant. (J.A. 131-8, 246 n.26) In short, relying on business judgment, the boss chose the individual who appeared most likely to contribute to the success of the organization.

Summary of Argument

Petitioner's indictment of promotion decisions involving "discretionary subjective evaluations" (Pet. Br. 11) attacks the most common method used by American employers to make final selections among competing applicants. Petitioner's refrain that personnel judgments are suspect or illegitimate if they are "subjective" relies on a distinction that is artificial. All personnel decisions involve value judgments by those responsible for the success of an enterprise. To label these judgments "objective" or "subjective" is of no help in deciding how they should be reviewed under Title VII. The decisions of this Court have never relied on such a distinction.

Intentional discrimination against individual employees was the principal evil Congress sought to eliminate when it enacted Title VII. This Court has enforced Title VII in

the absence of proof of intent only in cases where employers have erected systematic barriers to employment which have a disparate impact on members of protected groups. In *Griggs v. Duke Power Company*, 401 U.S. 424 (1971) this Court reviewed employment criteria which, though neutral on their face, too often worked to deny to black job applicants the opportunity to be considered on their individual merits. The diploma and test requirements imposed in *Griggs* permitted no case-by-case judgments about other qualities that might have recommended these candidates for selection. Under these special circumstances, this Court made an exception to the essential principle of Title VII that employers should be liable only for intentional discrimination. The Court held that specific selection devices which impose systematic, irrebuttable barriers to employment opportunities for blacks cannot survive Title VII review unless shown to "have a manifest relationship to the employment in question." *Id.* at 432.

In contrast to the well-defined, systematic criteria which disqualified a group of blacks from further consideration in *Griggs*, Petitioner has identified no specific employment criterion which she claims the Bank used to her disadvantage in evaluating her promotion application. Nor has Petitioner identified a test or employment policy which operated to the disadvantage of blacks generally in the competition for promotions. Having failed to show that she was treated any differently than her white competitors, Petitioner nevertheless insists that a promotion decision is inherently suspect if it is based on a manager's business judgment. According to Petitioner, every employer that permits its managers to exercise judgment in personnel decisions has to be prepared to prove the business necessity of such judgments. Since no illegitimate test or promotion criterion has been identified by Petitioner, this means much more than validating a single selection device, complex as even that usually proves to be. Petitioner appears to demand that employers "scientifically

validate" the general practice of permitting managers to make judgments about individual promotions, a practice so universal that it has never before been questioned in this Court. Indeed, this Court has taken pains to make sure that, in the absence of proof of intentional discrimination, routine business judgments about individuals are not second-guessed in the name of Title VII.

As is best illustrated by the discussion of "scientific validation" presented by Petitioner's amicus, the American Psychological Association, massive new burdens would be placed on employers by a requirement that they validate each of the criteria and procedures used to make judgments about individual employees. Petitioner's theory of Title VII would, therefore, lead inexorably to one of two results never intended by Congress. Employers that endeavor to "validate" the practice of permitting managers to make judgments will suffer the untold expense of validating a continuous stream of personnel decisions, followed by litigation of remarkable complexity, pitting one team of statisticians against another in battles about the quality of those validation efforts—and all in the absence of any proof of an intent to discriminate. For employers who choose not to employ "validators" to attempt to certify their judgments—perhaps because they simply cannot afford to do so—there will be only one other option. In order to avoid Title VII liability without "scientific validation" of every aspect of personnel management, these employers will see to it that their managers' judgments have no disparate impact on minorities by hiring and promoting on the basis of class membership. In short, numerical quotas become a low cost alternative to the impossibly complex system demanded by Petitioner and her amici.

The Court should reject Petitioner's effort to subject judgments about individual employees to disparate impact analysis when the disparate treatment approach has already provided her the opportunity to prove unlawful dis-

crimination. ASPA, IPMA and EMA urge the Court to reaffirm that the limited purpose of disparate impact analysis is to review specific employment devices which have the effect of systematically excluding members of protected groups from employment opportunities.

Argument

A. The Debate About The Legitimacy of "Subjective" vs. "Objective" Selection Criteria Badly Mischaracterizes What This Case Is About.

Petitioner, her amici and the authorities and commentators on which they rely use a confusing array of concepts to describe the Bank's method of making promotion decisions. The Bank's system is characterized as either a "subjective procedure" (Pet. Br. 39), one based on "subjective criteria" (*id.* at 47) or one "not guided by any criteria whatsoever." (*Id.* at 19.) Petitioner asserts that "the distinction between subjective and objective selection criteria is . . . artificial and pointless" (Pet. Br. 34), yet relies heavily on the notion that decisions concerning her applications for promotion are highly suspicious—and must be validated by "objective standards"—precisely because the process leading to those decisions was "highly subjective." (Pet. Br. 48.)

For most employers—and in light of this Court's jurisprudence —the debate about "subjective" versus "objective" employment procedures and criteria is academic and irrelevant. That debate blurs the very practical dispute before this Court without providing a sensible framework for its resolution. The monumental issue lying at the heart of this case cuts across the dimension of "subjectivity" versus "objectivity". The real issue is whether promotion decisions in which a few individuals compete for a single vacancy will continue to be based on a manager's business judgment, subject only to proof of an intent to discriminate, or whether the process by which employers make

individual personnel judgments will be saddled with the prior restraint of statistical validation.

The pointless debate about "subjectivity" and "objectivity" is most inappropriate because it has so little to do with the facts of the case before the Court. Petitioner sought to prove that she was judged by different standards than whites who competed with her for promotions. Accordingly, the Bank was obligated to identify its reasons for preferring other candidates, and it did so—experience, leadership, performance, and so on. The district court had the opportunity to judge whether these criteria actually distinguished her competitors or were a pretext for discrimination. The question for the district court had nothing to do with whether these criteria were "objective" or "subjective". The only appropriate question was whether Petitioner was tested by *different* criteria than her competitors. Petitioner's challenge was unsuccessful because the district court found that the reasons stated by Bank managers for promoting others were genuine and were not a pretext for discrimination.[1]

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[1] Petitioner's contention that it was "impossible" for her to succeed under a disparate treatment analysis because the Bank relied on "subjective" criteria is disproven by the entire history of Title VII enforcement. Petitioner argues that "[t]he employer can always put forth a subjective reason for selecting the 'best qualified' applicant the one with the 'best leadership' and 'ability' and these facially neutral standards are impossible to rebut." (Pet. Br. 56.) This is nonsense. Clearly, such rationales may be rebutted by evidence of the claimant's superior leadership skills or ability to do the job in question. This process is precisely the method of proof envisioned by this Court for deciding Title VII claims involving individual personnel decisions. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, the Court of Appeals had made the same argument now made by Petitioner about the difficulty of proving pretext and had placed the burden on the employer to *prove* that its stated reasons were genuine. This Court rejected that model of proof citing a variety of factors which left it "unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext." *Id.* at 258.

Petitioner's effort to show that the Bank's system for making promotion decisions had an adverse impact on blacks never merited serious consideration. The failure of Petitioner's disparate impact theory did not depend on considerations of "subjectivity" or "objectivity", but was unavoidable since it had no factual predicate. The district court's finding on this point was clear.

> The evidence showed that in addition to plaintiff, only one black, Sylvia Harden, had applied for promotions which were given to whites. Harden testified at trial that she did not allege that she has been discriminated against on that basis.

(J.A. 201.) Thus, whether properly labelled "objective" or "subjective", the criteria used by the Bank to make promotion decisions favored a white applicant over a black in the case of Petitioner and in only one other isolated case.

Petitioner's broadside attack on the Bank's personnel judgments concerning promotions as being "subjective," inherently suspect and unlawful in the absence of "scientific validation" is misguided. Every personnel decision reflects a business judgment about what is important to an organization and whether certain applicants possess those attributes. This is true whether the decision is made by a manager judging the responsiveness and demeanor of an applicant during an interview or by a written test instrument used to narrow a field of applicants. Whatever the format for its application, business judgment is the common denominator of all personnel decisions. Labelling one format "subjective" and another "objective" says precious little about the appropriate method of proof for deciding whether a judgment discriminated among applicants unlawfully.

A further problem with the "subjective/objective" dichotomy Petitioner seeks to construct is that it ignores the fact that most personnel decisions are multi-faceted, involving some criteria that Petitioner might label "objec-

tive" and some Petitioner might call "subjective." No matter how telling an employer's system for rating "objective" qualifications may be, most rating systems leave choices that must be made after the measurement of these qualifications has been completed. This Court has recognized:

> [i]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective.

Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. ____ , 94 L.Ed.2d 615, 636 n.17 (1987) (quoting Brief for American Society for Personnel Administration as *Amicus Curiae* in support of Respondents).

In *Johnson*, a rating system certified seven candidates as qualified for selection, leaving the final selection to the discretion of the Agency's Director. This Court expressed no disapproval over the fact that the Director "did not regard as significant" the candidates' different numerical ratings when he chose one individual from among those qualified. *Id.* at 626. Indeed, the Court thought that the legitimacy of the Director's final selection was enhanced because he relied on numerous factors independent of both gender and numerical ratings. *Id.*[2] To follow numerical

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[2] In testimony strikingly similar to the testimony of the Bank's Mr. Burt, the selecting official in *Johnson* testified: "I tried to look at the whole picture, the combination of her qualifications and [her competi-

ratings blindly would be to convert them inappropriately into "masters of reality." *Griggs v. Duke Power Co.*, *supra*, 401 U.S. at 433. Especially in the selection of supervisory personnel, few employers would be comfortable making hiring or promotion decisions "by the numbers" alone.

The Court should resist Petitioner's call to mechanistically divide the universe of personnel decisions into "subjective" and "objective" decisions. These labels are not helpful in understanding how individual personnel judgments are made and do not help distinguish the narrow category of exclusionary screening devices that are proper subjects for disparate impact analysis.

B. The Application of Complex Validation Strategies To Individual Personnel Decisions Is Not Required By Title VII.

1. Title VII Reflects the Traditional Approach Of Regulating Process and Opportunity, Not Substance Or Results.

In crafting an intricate pattern of obligations and duties to be met by our nation's employers, Congress has drawn a careful balance between legitimate business discretion and essential individual rights. Laws regulating employment relations have sought to provide guideposts sufficient to ensure that employment processes are conducted within the bounds of equal opportunity. Yet, these laws impose limitations upon employers which are only limitations of process, not result. Congress has never presumed it had the authority or ability to prescribe "good" or "approved" employment practices, nor has it delegated this job to the courts. Rather, statutes regulating the workplace have been constructed to eliminate only a handful of illegitimate employment practices from the universe of employment decisions.

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tor's] qualifications, their test scores, their expertise, their background, affirmative action matters, things like that . . . I believe it was a combination of all those." *Id* at 626. *See also* Pet. Br. at 8.

Evidence of this basic philosophy can be found in the National Labor Relations Act ("NLRA"), which served as a model for Title VII, and in Title VII itself. The duty to bargain in good faith lies at the heart of the statutory scheme of the NLRA. And it is here we find the strongest admonitions not to interfere in the substance of employment decisions. The test of good faith bargaining is not one of "objective" reasonableness. The parties are not required to "make 'objectively reasonable proposals' and employ objectively reasonable practices and procedures."[3] Had a standard of objective reasonableness been adopted, the judiciary would have been put in the position of setting the terms and conditions of individual collective agreements, thus imposing "a substantial interference by government with freedom of contract."[4] In *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), this Court reaffirmed the principle that good faith bargaining does not permit a government authority to impose the substantive terms of a collective bargaining agreement.

> One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 108.

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[3] Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, (1963) Lab. L.J. 1016, 1022.

[4] *Id.* at 1022. *See also, NLRB v. American National Ins. Co.*, 343 U.S. 395 (1952).

As with the NLRA, Title VII was not intended to substitute the judgment of agencies, courts or even recognized experts for the essential business judgments of individual employers. Rather, the law merely sets limits on business judgment consistent with the national policy prohibiting invidious forms of employment discrimination. Within these wide boundaries, employers are free to conduct their affairs guided by their own judgment of what is best for their business.

The apparent intentions of the 88th Congress, and particularly of the primary sponsors of Title VII, have been cast in different hues as the history of the statute has been examined over and over again. Shining through clearly, however, was an overriding fear expressed by many members, and repeatedly allayed by sponsors, that Title VII would not permit employers to continue to exercise legitimate judgment in employment decisions. Particularly illustrative of this debate were questions raised by Senator Dirksen and the responses of Senator Clark.

> Objection: The bill would make it unlawful for an employer to use qualification tests based upon verbal skills and other factors which may relate to the environmental conditioning of the applicant. In other words, all applicants must be treated as if they come from low-income, deprived communities in order to equate environmental inequalities of the culturally deprived group.
>
> Answer: The employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance.
>
> Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.
>
> Answer: Nothing in the bill will interfere with merit hiring, or merit promotion. The bill simply

> eliminates consideration of color from the decision to hire or promote.

110 Cong. Rec. 7218 (1964), *reprinted in* the EEOC's Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3015.

This policy of non-interference has been a guiding principle in the decisions of this Court interpreting Title VII. This Court has recognized that the fundamental purpose of Title VII is the preservation of equal employment *opportunities* for individuals and the removal of exclusionary *barriers* which deny to members of protected groups the opportunity to compete. For example, in *Griggs*, *supra*, the Court left to Duke Power the matter of how selections would be made once blacks were admitted to the competition. The Court's later opinions in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), made clear that employers are free to set any rules for the competition among individuals, so long as competitors of all races face the same hurdles.

The long-standing, well-settled policy of avoiding unnecessary interference with business judgment in regulating employment relations faces a frontal assault by Petitioner and her various amici. Petitioner's approach would require employers to base individual personnel decisions on criteria and methods amenable to "scientific validation," for the first time telling employers what they *must* do in the name of equal employment opportunity rather than what they may *not* do. An essential characteristic of this Court's decision in *Griggs*, *supra*, was that Duke Power Company could bring itself into compliance with Title VII by simply dropping its diploma and test requirements. Under Petitioner's approach, the Bank's hands would be bound to the process of "scientific validation" of its promotion decisions. The Bank must either

validate its "subjective" judgments or it must substitute, and validate, "objective" test mechanisms to take the place of those judgments. Statisticians, industrial psychologists and consultants would be indispensable actors in the role of "validators" required to certify every personnel decision. For every small and medium size employer which has neither the volume of personnel decisions nor the resources to warrant the implementation of a sophisticated and costly personnel research program, the course urged by Petitioner would be intolerable. For large employers making thousands of personnel judgments based on both standardized devices and managerial judgments, the cumulative burden of Petitioner's requirements would be staggering.

Fortunately, when presented with opportunities to impose restrictions on business judgment like those Petitioner demands, this Court has consistently followed the enduring principle of permitting legitimate managerial discretion.

2. In Its Leading Title VII Decisions, This Court Has Refused To Extend Disparate Impact Analysis To Manager's Judgments Of Individual Employees.

The legitimate role of managerial judgment in personnel decisions has never been in doubt in the decisions of this Court. Indeed, the Court's leading Title VII decisions have repeatedly reaffirmed the fundamental principle that Congress intended to preserve business discretion in personnel matters with only narrow, well-defined exceptions. The primary exception is intentional discrimination against members of protected groups. *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). The legitimate scope of managerial discretion emerges with particular clarity when the opinions defining this Court's approach to proof of unlawful discrimination are examined in light of the lower court theories they rejected—theories remarkably similar to Petitioner's misguided notion of how disparate impact analysis might be applied to individual personnel judgments.

In *Green v. McDonnell Douglas Corp.*, 463 F.2d 337 (8th Cir. 1972), the Eighth Circuit Court of Appeals misapplied *Griggs* in holding that a black job applicant could not be rejected unless the employer validated the reason for rejecting him by proving its relationship to actual job performance. Percy Green, a black man and a long-time civil rights activist, had been laid off from McDonnell Douglas. When hiring resumed, the company rejected Green's application because of his participation in a series of public demonstrations protesting McDonnell's allegedly discriminatory employment practices. *Id.* at 339. The Court of Appeals addressed the key question of whether it was necessary for McDonnell to validate this rationale by affirmative proof of a relationship between participation in such demonstrations and Green's actual work performance.

> The record shows that McDonnell has taken the position that it has the right under Title VII to make subjective hiring judgments which do not necessarily rest upon the ability of the applicant to perform the work required. . . .
>
> Our prior decisions make clear that, in cases presenting questions of discriminatory hiring practices, employment decisions based on subjective, rather than objective, criteria carry little weight in rebutting charges of discrimination. We reaffirm this principle here. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." [*Griggs*]. . . . Judicial acceptance of subjectively based hiring decisions must be limited if Title VII is to be more than an illusory commitment to that end, for subjective criteria may mask aspects of prohibited prejudice.

Id. at 343-4 (citations omitted).

This Court thus reviewed—and rejected—a well articulated theory for requiring employers to validate the reasons for individual personnel judgments by proving their job relatedness. Writing for a unanimous Court, Justice Powell's words speak directly to contentions advanced by Petitioner in the present case. First, the Court discredited the notion that McDonnell's rationale was illegitimate because it reflected a "subjective" judgment.

> The Court of Appeals intimated . . . that petitioner's stated reason for refusing to rehire respondent was a "subjective" rather than objective criterion which "carr[ies] little weight in rebutting charges of discrimination." . . . [W]e think the court below seriously underestimated the rebuttal weight to which petitioner's reasons were entitled.

McDonnell Douglas Corp. v. Green, supra, 411 U.S. at 803-6 (emphasis added). The Court then explained that disparate impact analysis was not intended to be applied to individualized judgments.

> The court below appeared to rely upon[*Griggs*] . . . But *Griggs* differs from the instant case in important respects. It dealt with *standardized testing devices* which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. . . . [*P*]*etitioner does not seek* [*Green's*] *exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior*, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it and, *in the absence of proof of pretext or discrimina-*

> *tory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment"* which the Court found to be the intention of Congress to remove.

Id. at 805-6 (citations and footnotes omitted) (emphasis added).

If there could be any doubt about whether this Court meant what it said in *McDonnell* in distinguishing the systematic disqualifying mechanisms rejected in *Griggs* from the individualized judgment attacked by Mr. Green, all such doubt should have been extinguished by the Court's decision in *Furnco Construction Corp., supra.* Once again, the full significance of this Court's opinion can be understood only by recalling the Court of Appeals analysis that was rejected.

Furnco Construction Corporation, a mason contractor, did not maintain a permanent force of bricklayers and did not accept applications from bricklayers looking for work. Instead, a superintendent selected for each job hired bricklayers from among those he knew to be experienced and competent. Black bricklayers complained that Title VII was violated by Furnco's policy of permitting a white superintendent to hire from a "personal list" which contained only the names of white bricklayers. The district court held that the black bricklayers had failed to prove a claim under either the "'disparate treatment' theory of *McDonnell Douglas*, . . . or the 'disparate impact' theory of *Griggs*."[5] The district court thought Furnco's hiring policy was justified by the company's need to hire bricklayers competent to meet its special needs and the practical difficulty of evaluating the qualifications of bricklayers appearing at the gate.[6]

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[5] *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 569 (1978).

[6] *Waters v. Furnco Construction Corp.*, 551 F.2d 1085, 1088-89 (7th Cir. 1977).

The Court of Appeals disagreed. Relying in part on the requirement of job relatedness set forth in *Griggs*, the Seventh Circuit held that Title VII required a less discretionary, more well-structured system for hiring bricklayers.

> It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. . . . The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective.
>
> . . .
>
> In *Griggs* . . ., the Supreme Court dealt with the use of testing devices in deciding whether to employ or promote. The Court held, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. Devices and mechanisms must not be given 'controlling' force unless they are demonstrably a reasonable measure of job performance."

Waters v. Furnco Construction Corporation, 551 F.2d 1085, 1088-89 (7th Cir. 1977) (citations omitted).

This Court "granted certiorari to consider whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices . . ." *Furnco Construction Corporation v. Waters*, *supra*, 438 U.S. at 574. The Court concluded that a "personal list" hiring policy was *not* the kind of facially neutral employment policy

subject to "disparate impact" analysis under *Griggs*, and warned courts not to substitute their view of good personnel practices for those of employers. In view of the Court of Appeals' reference to *Griggs*, this Court was careful to state expressly that reliance on *Griggs* was inappropriate.

> This case did not involve employment tests, which we dealt with in *Griggs* . . . and in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412-13 (1975), or particularized requirements such as the height and weight specifications considered in *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), and it was not a "pattern or practice" case like *Teamsters v. United States*, 431 U.S. 324, 358 (1977)

Id. at 575, n.7.[7]

Moreover, this Court was explicit in rejecting the concept that a personnel system must be "objective" or rational or systematic in order to comply with Title VII.

> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but there is nothing in the

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[7] Petitioner's perception that the Court did not reject application of disparate impact analysis in *Furnco*, but was merely noting a lack of evidence of impact (Pet. Br. 30), was not shared by other important observers. Two Justices dissented in part because of the Court's decision "to *foreclose on remand* further litigation on the Griggs question of whether petitioner's hiring practices had a disparate impact." 438 U.S. at 583 (emphasis added). On remand, the Seventh Circuit described this Court's decision as a determination that the Court of Appeals "had gone too far in requiring [the] *method*" of proof set forth in *Griggs*. *Waters v. Furnco Construction Corp.*, 688 F. 2d 39, 40 (7th Cir. 1982).

> record to indicate that it would be any less "haphazard, arbitrary and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. *Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.*

Id. at 578 (emphasis added).

In the case at bar, the Fifth Circuit Court of Appeals relied on its prior decision in *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), in holding that "disparate impact" analysis was not the proper vehicle for analyzing Petitioner Watson's claim of discrimination. *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 797 n.12 (5th Cir. 1986). In *Pouncy*, the Fifth Circuit carefully applied this Court's decision in *Griggs*, *supra*, and explained in particularly sensible, practical terms why "disparate impact" analysis may only be applied to a specific employment mechanism with a clear causal link to the disqualification of a protected class of individuals.

> The discriminatory impact model of proof in an employment discrimination case is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices. Nor may just any employment practice be challenged under this model simply because an uneven racial balance exists in an employer's workforce. As originally conceived in *Griggs* . . ., the disparate impact theory applied to an "overt, clearly identified nondiscretionary selection criteri[on] that [was] applied at a single point in a selection process." Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously, . . . this is an incorrect use of the model. *The disparate impact*

> *model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a causal connection to a class based imbalance in the workforce.*
>
> . . .
>
> . . Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy. . . . *We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices for to do so "would allow the disparate impact of one element to require validation of other elements having no adverse effects."*

Pouncy, supra, 668 F.2d at 800-1, (emphasis added) (citations omitted).

Thus, in *Pouncy* the Fifth Circuit identified what is the fatal flaw in Petitioner's unfocused attack on the Bank's "subjective" employment selection procedures. Petitioner fails to identify any specific promotion criteria or device which she claims produced a racial imbalance among the Bank's supervisors.[8] Petitioner's complaint is not about the use of any particular criterion, whether "objective" or "subjective", but about the use of a process that includes managerial judgment. What criterion or device was it that caused the "racial imbalance" about which Petitioner complains? In *Griggs* the causal connection was clear—here, Petitioner has made no effort to show causation. What

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[8] Of course, the record showed that only two black employees ever applied for supervisory positions which ultimately were awarded to whites. (J.A. 201)

criterion would the Bank attempt to validate if disparate impact were applied? With no evidence of a causal link to a specific practice, if a burden of validation were imposed on the Bank it would be forced to direct its statisticians to validate every facet of its selection process.

If Petitioner's contention is merely that the criterion that actually caused the Bank to prefer her competitors is one that the Bank will never articulate—namely, race—then Petitioner's claim falls squarely within the disparate treatment paradigm of *McDonnell Douglas* and *Furnco*, *supra*. Of course, the district court has already judged that the Bank's stated reasons for its treatment of Petitioner were genuine. The fact that Petitioner failed to persuade the district court that the Bank treated her differently than her white competitors does not justify her call for the application of the *Griggs* model of proof in circumstances it was never meant to address.

C. The American Psychological Association Seeks Inappropriately To Use Title VII To Impose Lofty Professional Standards On Individual Personnel Decisions Of Every Description.

Petitioner's amicus, The American Psychological Association ("APA"), introduces its brief with the disclaimer that it "will leave it to the parties to argue whether disparate impact analysis under Title VII . . . is properly applied to review the legality of subjective assessment devices for the hiring and promotion of employees." (APA Br. 2.) The APA explains that its limited purpose is merely to show, as a matter of psychometrics, that procedures like those used by the Bank *can* be "scientifically validated."

However, contrary to its opening disclaimer, the APA proceeds to argue not only that the Bank's employment devices *could* be validated but that they *should* be validated as a matter of law under Title VII. ASPA, IPMA and EMA respectfully disagree. Rather than presenting convincing reasons why employers should be forced to adopt

complex, statistically based personnel practices, the parade of research findings invoked by the APA shows the Court how burdensome such an imposition would be and how, in the final analysis, the "validation" recommended by the APA would do little to advance the cause of equal employment opportunity.

The APA's call to require validation of all selection devices—including processes like employment interviews—hinges on the faulty legal conclusion that "[t]he crucial public policy goals of Title VII would be thwarted if employers could rebut claims of discrimination simply by pointing to the results of unvalidated assessment devices, whether subjective or objective." (APA Br. 29.) This statement reflects a basic misunderstanding of Title VII law. Evidence simply describing the result of a choice between two employees is never enough to defend a disparate treatment claim. To rebut Petitioner's claim of discrimination the Bank had to do much more than simply "point to the results" of its managers' judgments. Under *McDonnell Douglas*, *supra*, the Bank was required to explain the factors that distinguished Petitioner from her competitors and, ultimately, the district court had to be convinced that those factors were the genuine reasons for its decision.

In view of the slender legal reed supporting the APA's position, the extreme financial and administrative burden that would be imposed on employers by the result it seeks looks even more out of place.[9] While the process of "sci-

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[9] ASPA, IPMA and EMA will not engage the APA in a technical debate about whether every legitimate selection device and criterion is amenable to "scientific validation" because even if that is true, such validation should not be required as a matter of law. One must wonder, however, whether "scientific" personnel selection devices will detect that certain something that makes one individual the perfect assistant to a particular supervisor, or that leads a decision maker to take a chance on an applicant because his or her unique personal history demonstrates an irresistible desire to succeed.

entific validation" may seem straightforward to a few industrial psychologists, the APA brief shows it to be a process of enormous complexity and one totally foreign to employers who rely in large measure on their managers' knowledge of employees in making promotion decisions. In the world of the APA, a single promotion decision is a journey that begins with many steps.

> There are many elements involved in the construction, development, and evaluation of an assessment instrument. Industrial psychologists and others who create a test or other selection procedure must choose the domain to be assessed, construct the items to which test takers will respond or select the behaviors to be observed, develop scaling scores and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound. The psychometric soundness of an instrument depends primarily on it being reliable and valid.

APA Br.9 (citations and footnotes omitted). The search for domains, scaling scores and the rest begins with the "essential prerequisite activity . . . known as job analysis." (APA Br.12.)

> Satisfying this essential prerequisite requires an analysis of the job in question, and a clear articulation of the knowledge, skills and abilities ("KSAs") or other personal characteristics or behaviors the exhibition of which determine proficiency at that job. These data can be secured through judgments of job incumbents, their supervisors, personnel specialists,[10] the professional

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[10] The APA does not explain why an industrial psychologist performing a job analysis may rely upon the "judgments" of incumbents and

> judgment of job experts, and through training manuals, job descriptions, and other written information. In addition, the relative importance of these KSAs must be determined. Finally, a close link between the assessment device and the identified job content or behavioral characteristic (construct) must be established.

APA Br.12-13 (citations and footnotes omitted).

In fact, a great many employers subject to Title VII do not now have job descriptions for each position in their organization—some have no job descriptions at all. Nor do many employers have personnel specialists, job experts or others prepared to produce job analyses in the manner called for by the APA for each current position or for new positions being created all the time. No law requires employers to maintain the personnel documents required for the APA's purposes. In accordance with the principle of non-interference, the equal opportunity laws have never mandated the personnel procedures and documents employers must use to manage their businesses. The position urged by the APA would do just that. The judgments of managers would be superseded by the computations of industrial psychologists. These requirements would exist not just for positions for which an individual employer decided to impose a screening test like the one reviewed in *Griggs*, *supra*, but for all positions filled by devices such as interviews and work histories—that is, for virtually *all* positions. Only a revolutionary interpretation of the meaning of employment discrimination would require this result.

As the APA explains its concept of personnel administration, the work of job analyses would only lay the groundwork for the process of "scientific validation." "For validation to be meaningful, it must predict performance

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supervisors while an employer's reliance on the judgments of its managers threatens to "undermine the purposes of Title VII." (APA Br. 21).

of a *particular* task or set of tasks . . . Thus, selection procedures or devices are validated for a particular job. . . ." (APA Br.10, emphasis original).[11] Not only must each device or criterion be validated separately for each job, according to the APA, but it is quite clear that business judgments thought to enjoy universal acceptance would be of no value in judging validity. "It could very well be that [Petitioner's] experience as a teller would be predictive of her success as a supervisor of tellers, but without an analysis of both positions, that assumption could very well be faulty." (APA Br.26.) According to the APA, in order for the Bank to properly credit Petitioner's work experience, it would have to treat "experience as one part of a carefully selected and logically and empirically justified comprehensive biographical data inventory." (APA Br.27.)[12]

Despite having every opportunity to do so, Petitioner has identified no specific employment criterion—such as experience—which has produced a disparate impact. Since Petitioner has claimed that it was the Bank's promotion process in general that has done so, the meaning of a requirement of "scientific validation" must be examined for the essential component of that process—the interview. The APA contends that interviews must be "scientifically validated." (APA Br. 14-17.) In essence, the APA says

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[11] The requirement of separate "scientific validation" for each selection device used for each position, and the focus on the personal characteristics of individual interviewers (APA Br. 14-17), is totally inconsistent with the APA's suggestion that firms with limited resources might conduct "crude validity studies" or use selection devices developed by others. (APA Br. 27.) Armed with the APA's definition of true "scientific validation," there is no reason to believe that Petitioner would have been satisfied with a "crude" substitute.

[12] The APA can point to no section of its *Standards for Educational and Psychological Testing* (1985) (the *"Standards"*) in support of this proposition. Indeed, the relevant section of its *Standards* suggests that reliance upon the established job performance record of an incumbent employee is a perfectly acceptable basis for deciding whether to promote that individual. *Standards* at 59.

that an interview is valid only if the interviewer asks questions that are "carefully linked to job analysis and performance criterion data" (APA Br. 16) and if the interviewer has been trained to elicit and interpret information. And according to the APA, the more interviewers the better. (APA Br. 16.) If linking questions to performance criterion data means measuring candidates during interviews in terms of criteria that have been validated independently, the validity of interviews as a device boils down to qualities of the interviewer. Did the interviewer have the "ability to relate" well to the candidate? (APA Br. 23.) Was the interviewer biased in favor of candidates "like him"? Did the interviewer use a stereotype to judge an individual candidate? (APA Br.14-15.)

This definition of interview validity means that after the position descriptions are written, domains defined, KSAs ranked, scores scaled, and results validated, Petitioner's challenge to the Bank's interview process turns on whether the manager who made the decision was biased. This, of course, was the essence of the disparate treatment analysis already completed by the district court. The circle of Petitioner's reasoning is thus complete. Consistent with this Court's view of the limited role of the disparate impact model of proof, analysis of a manager's intent should be the first, last and only analysis appropriate for deciding whether an employer has discriminated unlawfully in making an individual promotion decision.[13]

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[13] Indeed, contrary to the fairly rigid definition of "scientific validation" presented in the APA's Brief, the APA's own *Standards*, *supra* note 10, recognize that "it is not appropriate to tell a test user that particular levels of predictive validity and reliability need be met . . .," that "[c]ost-benefit compromises become . . . necessary . . .", and that "when test standards are not met in test use, reasons should be available." *Id.* at 41. Examination of an employer's reasons for action is what disparate treatment analysis is all about. Thus, the APA's professional standards describe a variety of circumstances in which all the work of "scientific validation" will not—and should not—resolve the matter of who should be selected in a particular case.

If the present debate was about good personnel practices rather than legal duties and liability, ASPA, IPMA and EMA would stand shoulder to shoulder with the APA in urging employers to adhere to the highest possible professional standards when designing their personnel practices. But that choice ought to be left to each employer's judgment about what is best for its business. On this point, we agree wholeheartedly with the APA's position before this Court in *Washington v. Davis*, 426 U.S. 229 (1976):

> [I]t is manifestly inappropriate for this profession to impose its ideals upon employers charged with meeting legal requirements while maintaining a profitable business.

Id., APA Brief as Amicus Curiae, No. 74-1492, at 28.

If the Court were to adopt the APA's standards for "scientific validation" as the test of Title VII compliance in reviewing individual promotion decisions, it should understand the risk of a paradoxical result. Many employers may not be able to afford to hire "validators" to certify the legitimacy of their managers' individual personnel decisions. Indeed, the APA's definition of validity is so closely tied to individual worksites, positions and decision-makers that the number of validations and revalidations to be performed could greatly exceed the productive capacity of the country's industrial psychologists.[14] For these or other reasons, some employers may be forced to choose an alternative to validation that is readily available but completely unacceptable. Validation would not be required of employers who abandon all criteria and judgment and sim-

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[14] Several hundred thousand employers are subject to Title VII. The number of different positions, employment criteria and decision-makers each requiring separate "scientific validation," according to the APA, is unfathomable. Yet, the APA's membership includes only 2,500 industrial psychologists. (APA Br. 1.) Employers must wonder whether anyone would be available to do the work of "scientific validation" Petitioner would have this Court require.

ply use quotas to make sure that managers' individual decisions do not create any numerical imbalance in their workforce. Hiring and promoting employees on the basis of class membership, of course, is precisely what Title VII was intended to prohibit.[15]

There is a very great difference between requiring "scientific validation" by an employer who *chooses* to use a specific screening device to narrow a field of applicants—as was the case in *Griggs*, *Albemarle*,[16] *Dothard*,[17] *New York City Transit Auth. v. Beazer*,[18] and *Connecticut v. Teal*,[19]—and requiring "scientific validation" by an employer that excludes no one from consideration but judges the qualities of each candidate individually. Those individual judgments are proper subjects for disparate treatment analysis. But employers who have not erected barriers to employment opportunities should not be saddled with compliance with any set of professional personnel standards simply as a cost of doing business.

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[15] Professor Bartholet has recognized that "quota or racially proportionate hiring" may result from the application of disparate impact analysis in the manner urged by Petitioner. Bartholet, E., *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945, 1026-7 (1982). In fact, Professor Bartholet concludes that racially proportionate hiring "seems an appropriate solution." *Id.*

[16] 422 U.S. 405 (1975) (written tests).

[17] 433 U.S. 321 (1977) (height and weight restrictions).

[18] 440 U.S. 568 (1979) (drug user exclusion).

[19] 457 U.S. 440 (1982) (written tests).

Conclusion

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

BREED, ABBOTT & MORGAN

*LAWRENCE Z. LORBER
J. ROBERT KIRK
1875 Eye Street, N.W.
Suite 1000
Washington, D. C. 20006

Attorneys for Amici Curiae, American Society for Personnel Administration, International Personnel Management Association and Employment Management Association

(**Counsel of Record*)

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Supreme Court of the United States
OCTOBER TERM, 1987

CLARA WATSON,
Petitioner,
v.
FORT WORTH BANK & TRUST,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR *AMICUS CURIAE* THE MERCHANTS AND MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT

PAUL GROSSMAN
Counsel of Record
PAUL, HASTINGS, JANOFSKY & WALKER
555 South Flower Street
Los Angeles, CA 90071
(213) 489-4000

PATRICK W. SHEA
PAUL, HASTINGS, JANOFSKY & WALKER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9000

Attorneys for *Amicus Curiae* The Merchants and Manufacturers Association

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BRIEF FOR *AMICUS CURIAE* THE MERCHANTS AND MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENT

The Merchants and Manufacturers Association respectfully submits this brief *amicus curiae* pursuant to the written consents of the parties.[1]

INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association is a voluntary, non-profit California corporation organized for the purpose of providing assistance and support to its member firms in the area of human resources management. The Association has approximately 3,000 member companies that employ approximately 1.5 million employees throughout the State of California.

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[1] These consents have been filed with the Clerk of the Court.

As part of the support it provides to its members, the Association monitors legislation or litigation that bears directly on employment issues. Where litigation raises particularly significant issues, the Association has often elected to participate as an *amicus curiae* to provide the courts with information concerning the practical impact of decisions on day-to-day personnel management.

The Court's resolution of the issue raised by this case—whether so-called "subjective" employment decisions must be validated professionally or otherwise shown to represent a "business necessity" whenever they have a significant adverse impact on any identifiable race, sex or ethnic group—will have profound consequences for the Association's members. In jobs that are not governed by collective bargaining agreements or civil service requirements, the overwhelming majority of personnel decisions that are made each day in the American workplace are subjective in nature, in the sense that they depend on the judgment of individual managers and supervisors rather than mechanical criteria or formulae. Petitioner in this case seeks to establish an interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, ("Title VII"), that would present employers with a Hobson's choice if they wish to avoid liability under Title VII for these types of personnel decisions—an employer would either have to spend huge sums on professional validation studies for all of its personnel decisions which might or might not withstand challenge or it would have to adopt informal quotas to ensure that personnel decisions never adversely impact any identifiable group. Such an interpretation would seriously impair the ability of the Association's members to engage in cost-effective and efficient personnel decisionmaking while complying with their legal obligation to ensure equal employment opportunity for each individual without regard to race, sex, religion or national origin.

SUMMARY OF ARGUMENT

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court held that Title VII forbids the use of facially neutral employment standards and requirements, such as standardized intelligence test scores or a high school diploma requirement, that have an adverse impact on a particular race, unless the employer meets "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 432. In so holding, this Court created a narrow exception to Title VII's requirement that discriminatory intent be shown. It did so in order to prevent the denial of employment opportunities to blacks by means of non-job-related objective requirements that would be difficult or impossible to attack as intentionally discriminatory. The Court, however, imposed on the employer the burden of showing job-relatedness only after the plaintiff in *Griggs* had (1) identified a specific objective employment standard or requirement and (2) demonstrated that application of this standard was causally linked to a significant adverse impact on a particular group.

Subsequent to *Griggs*, this Court has applied the adverse impact test only in cases dealing with an objective employment requirement or standard, *i.e.*, a standard having a fixed content that is applied mechanically and automatically without the exercise of discretion or judgment by the individual making the employment decision. Only in cases such as these have plaintiffs been able to meet the burden established by *Griggs* of identifying a specific employment standard or practice that is causally linked to adverse impact.

At the same time, this Court in disparate treatment pattern and practice cases such as *Hazelwood School District v. United States*, 433 U.S. 299 (1977), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), has developed an alternative means for analyzing statistical disparities that cumulatively result

from a large number of subjective employment decisions, *i.e.*, decisions involving the application of numerous criteria and standards to different applicants and employees in widely divergent jobs based on the judgments of different supervisors and managers. This Court has implicitly found applying the adverse impact test to such situations impractical, since plaintiffs in these cases cannot identify a specific employment standard or requirement that causes adverse impact and that can be assessed for job-relatedness. Instead, in cases where no specific standard or requirement can be identified because of the subjective nature of the decisionmaking process, this Court has held that plaintiffs' evidence should be examined to determine whether it proves discriminatory intent. In attempting to prove discriminatory intent, a plaintiff may rely on direct evidence of discrimination or on a wide range of circumstantial evidence, including evidence of statistical disparities or comparative anecdotal evidence.

In this case, petitioner asks this Court to collapse this established dichotomy for analyzing statistical disparities in Title VII cases. Petitioner below demonstrated that the cumulative effect of hundreds of subjective employment decisions made by different managers applying different standards and criteria to employees in different jobs resulted in a statistical disparity between the promotion rate and performance appraisal results of black and white employees of respondent Fort Worth Bank & Trust ("the Bank"). Petitioner could not point to any particular job standard or requirement that allegedly caused this statistical disparity. Instead, in light of this disparity, petitioner contends that her employer must now demonstrate the job-relatedness of its entire employment selection procedure as it is applied by every manager or supervisor to every job at the Bank.

Such a repudiation of the well-established differences between adverse impact and disparate treatment pattern

and practice cases would have dire consequences for employers. Few employers, particularly smaller ones with limited resources, could afford to obtain professional validation of each and every aspect of subjective employment decisionmaking in order to protect against Title VII liability in case such decisions cumulatively result in a significant adverse impact on an identifiable race, sex or ethnic group. Fewer still would be willing to risk second guessing whether a court would find a particular validation study acceptable, where the penalty for a wrong guess could be millions of dollars of backpay. Instead, the vast majority of employers would be forced to avoid potentially massive Title VII liability by avoiding adverse impact through the adoption of an informal quota system. Such a result is squarely contrary to the intent of Congress embodied in Title VII.

Ultimately, the adoption of petitioner's position would change the face of Title VII litigation. Few plaintiffs, if any, would continue to bring pattern and practice disparate treatment cases in which they would have to adduce evidence of discriminatory intent. Instead, by merely establishing a statistical disparity, they could shift the burden of proof and force an employer to demonstrate that the full range of its practices are not only nondiscriminatory, but job-related as well. In the final analysis, Title VII would cease to exist as a statute guaranteeing equal employment *opportunity* primarily by forbidding intentional discrimination and instead would become a statute guaranteeing equality of employment *results* for every race, sex and ethnic group. Because this is plainly contrary to Title VII, petitioner's position should be rejected and the judgment of the Court of Appeals affirmed.

ARGUMENT

I. THIS COURT HAS PROPERLY LIMITED APPLICATION OF THE *GRIGGS* ADVERSE IMPACT TEST TO CASES IN WHICH AN OBJECTIVE EMPLOYMENT STANDARD IS CHALLENGED.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court held that an employer violated Title VII by denying employment opportunities to black employees based on the results of intelligence test scores and a high school diploma requirement, where the employer had failed to meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Id.* at 432. In *Griggs*, the plaintiff identified two specific employment requirements or standards and demonstrated that application of these requirements was causally linked to an adverse impact on the selection of blacks. The Court specifically stressed the element of causation:

> [o]n the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. 420 F.2d 1225, 1239 n.6. *This consequence would appear to be directly traceable to race.* Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County v. United States*, 395 U.S. 285 (1969).

Id. at 430 (footnote omitted and emphasis added).[2]

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[2] The Court appropriately stressed this element of causation given its reliance on the language of Section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), in fashioning the adverse impact test. *See Connecticut v. Teal*, 457 U.S. 440, 445-46 (1982) (noting reliance in *Griggs* on Section 703(a)(2)). Section 703(a)(2) forbids an employer to limit, segregate or classify employees in any manner that may adversely affect employment status or opportunities *"because* of such individual's race, color, religion, sex, or national origin" (emphasis added).

The employer in *Griggs* had adopted the diploma and intelligence test requirements on the same date Title VII became effective, 401 U.S. at 427-28. As such, the requirements were an obvious attempt to circumvent the equal employment opportunity requirements of Title VII. Nevertheless, the plaintiff had been unable to prove that these requirements were adopted with discriminatory intent. 401 U.S. at 432. Moreover, because these requirements were objective and left no discretion to individual decisionmakers, it was equally difficult to prove discriminatory intent in the application of these requirements.

Griggs thus presented the Court with a loophole in Title VII that certain employers could exploit to deny employment opportunities to blacks. The only way to close this loophole was to require employers to show the job-relatedness of objective requirements which caused an adverse impact and which could not readily be challenged as intentionally discriminatory. Accordingly, the court in *Griggs* created a narrow exception to the general requirement of proof of discriminatory intent that was clearly intended by Congress in enacting Title VII. *See infra*, at 14-15.

In keeping with this purpose, this Court subsequent to *Griggs* has limited application of the adverse impact test in every case it has decided to situations where plaintiffs: 1) identified a specific objective employment standard or requirement and 2) demonstrated that application of the standard or requirement caused an adverse impact. Thus, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), another case dealing with objective employment tests that caused adverse impact, this Court emphasized:

> This burden [of showing job-relatedness] arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants

> for hire or promotion in a racial pattern significantly different from that of the pool of applicants.

Id. at 425.

Similarly, in *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977), the Court had before it evidence that the overall hiring process for correctional counselors in the Alabama prison system had produced a substantial statistical disparity in the hiring of women. *See id.* (noting that women age 14 or older constitute 36.89% of the Alabama labor force, but only 12.9% of the correctional counselors). Nevertheless, the Court did not require the employer to prove the job-relatedness of each and every employment standard used in the hiring process. Instead, it required plaintiffs to identify a specific objective requirement—in this case a height and weight requirement—and prove that it caused an adverse impact. *Id.* at 330-31. *See also Id.* at 348-49 (White, J., dissenting) (plaintiff failed to prove *prima facie* case because general population statistics insufficient to prove that height and weight standard caused adverse impact).[3]

Most recently, in *Connecticut v. Teal*, 457 U.S. 440 (1982), another case dealing with an objective employment test, this Court again emphasized that the adverse impact test only applies to specifically identified employment standards or requirements that are causally linked to an adverse impact. In rejecting an employer's reliance on a "bottom line" defense, the Court noted:

> In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create

[3] In *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), this Court likewise required plaintiffs who brought an adverse impact challenge to identify a specific objective job requirement—in this case, exclusion of methadone users from specific jobs—and to prove that this requirement caused an adverse impact. Plaintiffs' claim failed because they failed to prove that the requirement caused an adverse impact. *Id.* at 584-86.

> a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

Id. at 450 (underlining added).

Thus, in every adverse impact case this Court has considered, plaintiffs have been required to identify a specific employment standard or requirement and prove that its application causes adverse impact. Plaintiffs have never been able to meet this burden in cases involving subjective decisionmaking, and this Court has accordingly refused to apply adverse impact analysis in such cases. For example, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), plaintiff challenged his employer's refusal to re-hire him because he participated in an illegal "stall-in." Plaintiff, however, offered no evidence suggesting that the Company had adopted an objective standard or requirement excluding from employment all persons who had engaged in unlawful conduct or that such a standard, if applied generally, would have had an adverse impact on blacks. This Court, therefore, held that the Court of Appeals had erred in analyzing the case under the *Griggs* adverse impact test. *Id.* at 805-06. It noted:

> *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. . . . Respondent, however, appears in different clothing. . . . And [his employer] does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. Petitioner assertedly rejected respondent for unlawful conduct against it

> and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary, and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove.

Id. at 806.

Similarly, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court held that plaintiffs could not mount an adverse impact challenge to hiring decisions made by a superintendent based on his subjective assessment of competence and experience derived from personal work experience or recommendations. The Court noted:

> We agree with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas, supra*.[7]

[7] This case did not involve employment tests, which we dealt with in *Griggs* . . . and in *Albemarle Paper Co.* . . . or particularized requirements such as the height and weight specifications considered in *Dothard* . . . .

Id. at 575 & n.7.[8]

[8] The Court of Appeals' determination, with which this Court agreed, similarly held:

> As we understand the *Griggs* principle, it provides a method for establishing the presence of discrimination where application of a test to a group of employees or applicants results in a proportionally higher rate of rejection of members of a minority group. Here the reliance upon the superintendent's recollection of bricklayers he considered competent was not a test or device for comparing the members of a group of prospective employees, for there was no defined group . . . .
>
> * * * *
>
> . . . This was not a case, like *Griggs*, of comparing white and black applicants by objective, but irrelevant standards, and rejecting more blacks, proportionally, than whites.

Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1089-90 (7th Cir. 1977), *rev'd on other grounds*, 438 U.S. 567 (1978).

These subsequent decisions limiting application of the *Griggs* test to objective employment standards or requirements necessarily follow from the focus in *Griggs* on whether a specific job requirement or standard causes an adverse impact and if so, whether the standard can be justified as job-related.[5] *Griggs*, 401 U.S. at 431. Only in such cases do facially neutral standards constitute unlawful "'built-in headwinds' for minority groups [that] are unrelated to measuring job capability." *Id.* at 432.

This inquiry can readily be applied to objective employment standards or requirements. Because such requirements have a fixed content and are automatically and mechanically applied, one can readily determine whether the standard or requirement causes an adverse impact by examining its effect on a large group of people, usually either the employer's workforce[6] or the gen-

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[5] On occasion this Court has referred to this inquiry as an assessment of whether a particular standard represents a "business necessity." *Griggs*, 401 U.S. at 431. This Court, however, has never required a true showing of business necessity, *i.e.*, proof that a standard having a disparate impact is so vital that an employer could not do business without it. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. at 587 n.31 (exclusion of methadone users from positions with transit authority held lawful, even if it caused adverse impact, where goals of efficiency and safety "are significantly served by—*even if they do not require*—[such] rule . . . .") (emphasis added). Applying a strict test of business necessity in adverse impact cases would in many cases result in identical treatment for facially neutral requirements and requirements that expressly discriminate on their face on the basis of sex, religion or national origin. *See* 42 U.S.C. § 2000e-2(e) (classifications that expressly discriminate on the basis of sex, religion or national origin are lawful if they constitute "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .").

[6] *See, e.g., Griggs*, 401 U.S. at 430 n.6 (adverse impact shown where applying test to workforce resulted in 58% of whites passing test but only 6% of blacks).

eral population.[7] Assessing job-relatedness is also feasible in the case of an objective standard because it has a fixed content that can be examined to determine if it accurately measures qualifications related to the successful performance of a particular job. *See, e.g., United States v. South Carolina*, 434 U.S. 1026 (1978), *aff'g per curiam*, 445 F. Supp. 1094, 1112 (D.S.C. 1977) (3-judge court) (state-sponsored objective teacher examination was job-related where "the content of the tests matches the content of the teacher training programs in South Carolina").

By contrast, subjective decisionmaking processes are not susceptible to analysis under the adverse impact test. In the first instance, identifying specific employment standards or requirements that are applied as part of a subjective decisionmaking process is difficult or impossible. For example, in this case petitioner concedes that promotion decisions at the Bank were not based on a single identified standard, but instead involved individual judgments about numerous criteria such as previous supervisory experience, leadership, ability to get along with others, and general experience (Pet. Br. at 8).

Second, even if a specific standard or requirement is identified, assessing whether application of the standard has caused an adverse impact on a particular group is impossible in the subjective decisionmaking context. Subjective standards, such as the ability to get along with people or leadership qualities, are not applied mechanically or automatically. Instead, each such standard is considered as one of several factors in assessing the overall qualifications of a particular candidate. Because of this multi-faceted process, ascertaining whether the appli-

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[7] *See, e.g., id.* at 430 n.6 (adverse impact of high school diploma requirement shown where 1960 census data showed that 34% of white males in North Carolina had completed high school, but only 12% of black males).

cation of a particular standard has had an adverse impact on a particular race, sex or ethnic group is virtually impossible. *See, e.g., Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795, 801 (5th Cir. 1982) (noting that "[a]ptitude tests, height and weight requirements, and similar selection criteria all may be shown to affect one class of employees more harshly than another" while plaintiff "has not shown, nor can he show, that independent of other factors the [subjective] employment practices he challenges have caused the racial imbalance in [the employer's] work force.")

Because analysis of subjective decisionmaking under the adverse impact test does not identify a specific job standard or requirement that is causally linked to an adverse impact, making a determination of job-relatedness is also difficult or impossible. Thus, for example, under petitioner's view, the employer in this case is not just required to establish job-relatedness for a specific standard or requirement—such as consideration of prior supervisory experience in promotion decisions or assessment of physical fitness in performance appraisals. Instead, the employer must justify as job-related the entire range of standards it applies in its subjective decisionmaking processes whether or not any particular standard has been identified as causing an adverse impact.[8] Such an enormously burdensome requirement goes far beyond the limited holding in *Griggs* and its progeny which require a showing of job-relatedness only for specific job qualifications or requirements that are causally linked to an adverse impact. *See, e.g., Pouncy*, 668 F.2d at 801 ("[w]e do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices. . . ."); *Latino Unidos de Chelsea En Accion v. Secretary of HUD*, 799 F.2d 774, 786 (1st Cir. 1986) ("[a]t least in

[8] *See* Pet. Br. at 62.

this case, the disparate impact model is inappropriate because plaintiffs point to no specific practice—objective *or* subjective—that allegedly caused a discriminatory impact on minorities. They claim only that Chelsea employs a disproportionately low number of minorities.").

Precluding application of the *Griggs* test to subjective employment decisions is also consistent with the nature of subjective decisionmaking. The *Griggs* test was adopted to avoid the difficulty of proving that an objective requirement which leaves no discretion to individual decisionmakers is intentionally discriminatory. By contrast, subjective employment decisions depend on the judgment and discretion of individual decisionmakers and by their very nature are governed by intent and motivation. *See* 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34 at 15-87 to 15-88 (1987). Accordingly, it is appropriate to focus on whether the intent of the decisionmaker was tainted by discriminatory animus. *See* Note, *Evaluation of Subjective Selection Systems in Title VII Employment Discrimination Cases: A Misuse of Disparate Impact Analysis*, 7 Cardozo L. Rev. 549, 580-82 (1986).

Limiting the *Griggs* test to objective standards and requirements is also consistent with Title VII's emphasis on prohibiting discriminatory intent. As this Court has noted, "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *International Brotherhood of Teamsters v. United States*, 431 U.S. at 335 n.15. Even one group of *amici* supporting petitioner likewise concedes that "[e]liminating *intentional* discrimination was the first and most important goal of Congress in 1964."[9] This observation is confirmed by Title VII's legislative history. Senator Humphrey (D. Minn.), for example, one of the main proponents of Title VII, observed that "[s]ince the title

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[9] Brief of *Amici Curiae* State of Texas, *et al.*, at 12 (emphasis in original).

bars only discrimination because of race, color, religion, sex or natural [sic] origin it would seem . . . to require intent." 110 Cong. Rec. 12,723-24 (1964). *See also* 110 Cong. Rec. 7213 (1964) (interpretative memorandum of Sens. Clark and Case) (noting that meaning of discrimination is "clear and simple" and refers to "mak[ing] a distinction . . . [or] difference in treatment or favor" because of prohibited classification); 110 Cong. Rec. 7477 (1964) (Bipartisan Civil Rights Newsletter submitted by Title VII proponents) (same). The *Griggs* rule represents a narrow exception to this general principle that was adopted to prevent circumvention of Title VII by resort to non-job-related objective requirements. This exception should not be expanded beyond its current limited scope.

II. THE *GRIGGS* TEST MAY NOT IN ANY EVENT BE APPLIED IN CASES SUCH AS THIS WHERE PLAINTIFF HAS FAILED TO IDENTIFY A PARTICULAR EMPLOYMENT STANDARD OR JOB REQUIREMENT THAT HAS CAUSED AN ADVERSE IMPACT.

As noted above, a majority of this Court in *Furnco Construction* held that a subjective process of hiring bricklayers was not susceptible to analysis under the *Griggs* adverse impact test. Justice Marshall, joined by Justice Brennan, in dissent contended that the subjective hiring process could be analyzed under the *Griggs* test if plaintiff proved that "a particular practice in actuality 'operates to exclude Negroes.'" *Furnco Construction Corp. v. Waters*, 438 U.S. at 583. Even under the dissenters' view, however, the employer was not obligated to demonstrate the job-relatedness of its entire subjective hiring process merely because it had hired proportionately fewer blacks than whites. Rather, the dissenters noted that the *Griggs* test would be applicable if plaintiff identified a specific job requirement or standard that was causally linked to an adverse impact:

> Under this principle, a practice of limiting jobs to those with prior experience working in an industry or for a particular person, or to those who hear about jobs by word of mouth would be invalid if the practice in actuality impacts more harshly on a group protected under Title VII, unless the practice can be justified by business necessity.

Id.[10]

Thus, even under the view expressed by the dissenters in *Furnco*, a plaintiff must identify a specific employment standard or requirement that causes an adverse impact in a subjective decisionmaking process in order to make out a *prime facie* case of adverse impact. Petitioner has failed to meet this burden in this case. While Petitioner in her brief identifies a number of specific standards and requirements that are used by the Bank in assessing performance and making promotion decisions,[11] petitioner has failed to show that the application of any of these requirements has caused an adverse impact on black employees. Instead, petitioner has merely pointed

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[10] Limiting hiring to persons who hear about a job by word of mouth on its face is not a job qualification or standard, but such a procedure implicitly carries with it a specific requirement for hiring, *i.e.* personal acquaintance with someone in the employer's workforce.

[11] Petitioner, for example, notes that promotion decisions have been based on previous supervisory experience, leadership, ability to get along with others and general experience. Pet. Br. at 8. Performance appraisals are based on an assessment of accuracy of work, alertness, personal appearance, supervisor-co-worker relations, quantity of work, physical fitness, attendance, dependability, stability, ambition, friendliness, courtesy, job knowledge, and experience. *See* Pet. App. 23a n.26; Tr. III32-III45, III75-III76. *Amicus* American Psychological Association contends that the job-relatedness of certain of these criteria, *e.g.*, physical fitness, is questionable. Brief of *Amicus Curiae* American Psychological Association ("APA Br.") at 25. Petitioner, however, has not pointed to any evidence suggesting that blacks were rated lower on the physical fitness criteria than whites.

to an overall statistical disparity in black and white promotion rates and performance appraisals that cumulatively has resulted from hundreds of subjective employment decisions by different supervisors applying a wide range of criteria and qualifications to employees in a number of different jobs. Petitioner has sought to avoid identifying a particular job standard or qualification that is causally linked to this disparity by claiming that the application of varying standards in the hundreds of employment decisions at issue constitutes a single "procedure"—subjectivity in personnel decisionmaking—which must be validated under the *Griggs* test.[12]

The requirements of *Griggs* cannot be so easily evaded. Subjectivity in personnel decisionmaking is not a standard, qualification or requirement susceptible to analysis under the *Griggs* test for job-relatedness. At most, the particular standards and criteria that are applied in the subjective decisionmaking process—*e.g.*, subjective consideration of prior work experience in the industry—are subject to potential scrutiny for job-relatedness under *Griggs*. Such standards and criteria, however, need only be so scrutinized if the plaintiff has proven that application of the standard causes an adverse impact. Petitioner has not done so in this case.

This Court has devised a separate method for analyzing cases like the instant one where plaintiffs point to a statistical disparity in the cumulative results of hiring or promotion decisions, but where plaintiffs fail to identify a specific employment standard or requirement that has caused an adverse impact. Cases such as these are analyzed as pattern and practice disparate treatment

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[12] Indeed, petitioner has not even focused on a particular job or group of jobs within the Bank, but instead has relied solely on a disparity that cumulatively results from employment decisions affecting numerous different jobs. Petitioner claims that, in light of this overall disparity, promotion and appraisal procedures must be validated for *all* jobs at the Bank.

cases under the standards set forth in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324. In such a case, the plaintiff has the burden of proving "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts," but must instead "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *Id.* at 335 n.15.

This Court has never indicated that the mere existence of a statistical disparity in overall hiring or promotion decisions may be analyzed under the adverse impact test so as to require an employer to justify as job-related every decision that contributed to the disparity.[13] To the contrary, this Court in *Hazelwood School District v. United States*, 433 U.S. 299 (1977), was specifically confronted with a statistical disparity in the hiring of blacks that resulted from "relatively unstructured procedures in hiring" in which individual principals "possessed virtually unlimited discretion in hiring teachers" based on their subjective determination of which applicant was "the 'most competent' person available." *Id.* at 301-02. This Court analyzed the case under the disparate treatment pattern and practice test established by *Teamsters*, rather than requiring the employer to demonstrate that

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[13] In *Teamsters*, the Court did note that "[e]ither theory [disparate impact or disparate treatment] may, of course, be applied to a particular set of facts." 431 U.S. at 335 n.15. At most, this ambiguous *dictum* suggests that certain fact situations may exist, *e.g.*, where a specific employment requirement having a disparate impact is used *and* an overall pattern of intentional discrimination is evident, where adverse impact and disparate treatment theories may both apply. The statement, however, by no means indicates that each theory is fully applicable to every set of facts.

each requirement or standard applied in its entirely subjective hiring process was job-related. *Id.* at 307.[14]

Petitioner complains that proving discriminatory intent under a disparate treatment theory is a "virtual impossibility." Pet. Br. at 56. The courts, however, have recognized a wide range of evidence that plaintiffs can use to establish discriminatory intent. *See* B. Schlei & P. Grossman, *Employment Discrimination* 1314 (2d ed. 1983) (discriminatory intent may be shown by direct evidence, comparative evidence, and/or statistics).[15] In particular, the existence of substantial statistical disparities can provide compelling evidence of discriminatory intent where the employer is unable to offer any nondiscriminatory explanation for the disparity. Only recently this Court emphasized:

> [I]t is clear that a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. . . . [A]s long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail.

Bazemore v. Friday, —— U.S. ——, 106 S.Ct. 3000, 3009 (1986).

Similarly, while the existence of subjective decision-making practices should not shift the burden to the em-

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[14] Petitioner erroneously characterizes *Hazelwood* as an adverse impact case. Pet. Br. at 29. The Court in *Hazelwood* expressly noted that the plaintiff's theory was that "'the [employer], in violation of § 703(a) of Title VII, regularly and *purposefully* treated Negroes . . . less favorably than white persons.'" *Id.*, 433 U.S. at 306 n.12 (quoting *Teamsters v. United States*, 431 U.S. at 335) (emphasis added).

[15] Counsel of record is the co-author of this treatise.

ployer to prove job-relatedness, this is one fact that may be considered in determining whether the plaintiff has proved discriminatory intent. *See, e.g., Davis v. Califano*, 613 F.2d 957, 965 (D.C. Cir. 1979) (noting that subjective standards should be "closely scrutinized" for unlawful bias); B. Schlei & P. Grossman, *supra*, at 1317 n.79. Given this wide range of evidence, proving discriminatory intent is hardly a "virtual impossibility." To the contrary, the numerous victories of plaintiffs in Title VII cases constitute ample evidence that where an employer has actually engaged in a pattern of discrimination, plaintiffs can prove it.[16]

Were the Court to adopt petitioner's view, the disparate treatment pattern and practice theory articulated in *Teamsters* and *Hazelwood* would soon become a disused relic. No rational plaintiff would attempt to compile evidence suggesting a pattern of intentional discrimination, if merely showing the existence of a statistical disparity was enough to force the employer to prove that its entire system of employment decisionmaking was not only nondiscriminatory, but job-related as well. Petitioner concedes as much, noting that the "disparate treatment [theory] is the exception rather than the rule in the fight to end racial injustice" which should be employed only if "there is no evidence to support an impact sufficient to invoke *Griggs*." Pet. Br. at 25. Petitioner's view should

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[16] Indeed, petitioner's brief refers to direct evidence of discrimination, Pet. Br. at 4 n.5 (the personnel manager allegedly told the petitioner "[i]t's a lot of money, you know, for blacks to have to count" when considering her for a teller position), comparative evidence, Pet. Br. at 9-10 (noting differential treatment of experience, ability to get along with others, and other factors in consideration of petitioner and white employees) and statistical evidence, Pet. Br. 11-16, (noting unexplained significant disparities in promotions and performance appraisals). If petitioner were correct in stating that the Bank offered no explanation or rebuttal of this evidence, petitioner should have prevailed on her disparate treatment claim.

be rejected because it stands the intent of Congress on its head and renders meaningless the well-developed distinction this Court has drawn between adverse impact and pattern and practice disparate treatment cases.

III. REQUIRING PROFESSIONAL VALIDATION OF EVERY ASPECT OF AN EMPLOYER'S SUBJECTIVE DECISIONMAKING PROCESS WOULD HAVE DISASTROUS CONSEQUENCES FOR EMPLOYERS.

Because she has shown a cumulative statistical disparity in overall appraisal or promotion results at the Bank, petitioner contends that the Bank is obligated to validate every aspect of its appraisal and promotional decisionmaking process for every job at the Bank. It would impose an enormous burden on the Bank and on employers generally if the Court were to adopt this position.

Professional validation of selection procedures is an extraordinarily expensive and time-consuming undertaking. The Uniform Guidelines on Employee Selection, 29 C.F.R. Part 1607, outline technical standards for the three accepted methods for validating selection procedures —criterion validity studies, content validity studies, and construct validity studies. A criterion validity study at a minimum requires:

1) preparation of a job analysis for each job in question which identifies performance measures or criteria that are relevant to critical job duties, work behavior or work outcomes, 29 C.F.R. § 1607.14(B)(2);

2) development of an unbiased method for measuring each of the performance measures or criteria, 29 C.F.R. § 1607.14(B)(3);

3) calculation and evaluation of the statistical relationship between selection procedure scores and performance measures "using professionally acceptable statistical procedures," 29 C.F.R. § 1607.14(B)(5);

4) calculation and evaluation of the correlation coefficient between selection procedure scores and performance measures, 29 C.F.R. § 1607.14(B)(6), and

5) if technically feasible, a separate fairness study that examines whether a selection procedure unfairly denies opportunities to members of a particular group, 29 C.F.R. § 1607.14(B)(8).

A content validity study has equally exacting requirements, including:

1) preparation of a job analysis for each job in question which analyzes the important observable work behaviors required for successful performance, their relative importance, and any observable work product, 29 C.F.R. § 1607.14(C)(2);

2) acquisition or development of a selection procedure designed to measure these behaviors, 29 C.F.R. § 1607.14(C)(3);

3) demonstration that the selection procedure accurately measures a representative sample of typical job behaviors or work products, 29 C.F.R. § 1607.14(C)(4);

4) if the procedure attempts to measure a knowledge, skill or ability, a showing that the knowledge, skill or ability is:

a) operationally defined;

b) accurately measured by the selection procedure; and

c) used in the job as a necessary prerequisite to a critical work behavior, 29 C.F.R. § 1607.14(C)(4);

5) whenever feasible, an appropriate statistical estimate of reliability, 29 C.F.R. § 1607.14(C)(5); and

6) if the procedure is used to rank persons, a separate showing that the procedure accurately measures

those aspects of performance which differentiate among different performance levels, 29 C.F.R. § 1607.14(C)(9).

Construct validity studies are even more complex and may involve aspects of both criterion validity and content validity studies. The Uniform Guidelines advise:

> The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies.

29 C.F.R. § 1607.14(D).

Conducting one or more validity studies under these guidelines is extremely burdensome for employers, even if they are only required to validate a single objective test or requirement for a particular job. *See, e.g.*, Lerner, *Employment Discrimination: Adverse Impact, Validity, and Equality*, 1979 Sup. Ct. Rev. 17, 18 n.6 (citing estimate that "adequate criterion validity studies tend to cost something between $100,000 and $400,000 and . . . take approximately two years"); Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633, 643 (1979) ("Employers seeking to validate the job-relatedness of a single employee characteristic such as an arithmetic test for machinists could expect to incur validation costs ranging from $20,000 to $100,000."). Requiring an employer to validate every aspect of every subjective selection decision for every one of its jobs based on nothing more than an overall statistical disparity in promotions or performance appraisals would be immensely more burdensome. This is particularly true in the subjective decisionmaking context where validation requires analysis of both the selection procedure and each individual responsible for making selection decisions. As the Brief for *Amicus Curiae* American Psychological Association ("the APA Brief") puts it, "[t]he validity of the *interviewer*

must also be established" (APA Br. at 16) (emphasis in original). This requires an examination of the amount and type of training each decisionmaker has received and potentially a review of each decisionmaker's prior decisions "to identify those interviewers whose decisions are most reliable and valid and rely on those interviewers singly to make judgments." *Id.*[17]

Petitioner contends that requiring validation of subjective decisionmaking practices would not be burdensome. For this point, she relies almost exclusively on the *amicus* brief submitted by the APA. The APA does argue that "[s]ubjective selection devices *can* be scientifically validated for the assessment of individuals for hiring, promotion, or other selection decisions in the employment context." APA Br. at 2. (emphasis in original). One searches the APA brief in vain, however, for any suggestion that such validation procedures are not time consuming, burdensome or costly. Indeed, the APA does not cite a single case in which subjective employment decisionmaking procedures have ever been successfully validated under the exacting standards it proposes.[18]

Similarly, petitioner argues that generalized validation studies are available from publishers or other sources that can be used by small employers in lieu of conducting their

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[17] At least with an adverse impact challenge to an objective employment standard, the employer wins by proving that the standard is job-related, absent a showing by plaintiff that less discriminatory alternatives are available. *See* B. Schlei & P. Grossman, *supra*, at 91-92. In the subjective context, even if the employer's procedures have been professionally validated, the employer may still be vulnerable to a claim of disparate treatment. Plaintiffs are thus afforded two bites at the apple.

[18] The Association is also not an entirely disinterested party. Were the Court to adopt the Association's position, Title VII would be transformed into a full employment bill for industrial psychologists, since every employer in the United States that was unwilling to use quotas would have to attempt professional validation of all its employment procedures.

own studies. Pet. Br. at 63. The Uniform Guidelines, however, caution that:

> If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above [referring to elimination of adverse impact].

29 C.F.R. § 1607.7 (D). Since the training and track record of individual decisionmakers is a critical variable in assessing the validity of subjective decisionmaking procedures, the use of validity studies prepared by publishers or other employers would not appear to be an option in the subjective decisionmaking context.

Petitioner also contends that requiring validation would not be burdensome because "[b]efore any validation must take place, the plaintiff must show impact." Pet. Br. at 63. Unfortunately, however, an employer cannot know in advance whether a particular subjective decisionmaking process will have an adverse impact. If an employer waits until adverse impact has already occurred and then attempts unsuccessfully to validate its procedures, it faces exposure to massive back pay liability under Title VII. The only way to avoid this exposure is either to validate professionally every aspect of every subjective decisionmaking process for every job[19] or to make certain that adverse impact will never result by adopting an informal quota system. Given the enormous cost of the former alternative, almost every employer will be forced to resort to quotas if this Court adopts petitioner's views. *See Connecticut v. Teal*, 457 U.S. at 463 (Powell, J., dissenting) ("For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring."); *Al-*

[19] Even this alternative offers no guarantee against Title VII liability, as there is always a risk that a court will second-guess the adequacy of a validity study.

bemarle Paper Co. v. Moody, 422 U.S. at 449 (Blackmun, J., concurring in the judgment) ("[A] too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection.").[20]

A requirement that employers use quotas—either formally or informally—is contrary to Title VII. Congress added Section 703(j) to Title VII to "state[] expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance." *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, —— U.S. ——, 106 S. Ct. 3019, 3043-44 (1986) (plurality opinion of Brennan, J.); *accord United Steelworkers of America v. Weber*, 443 U.S. 193, 205-06 (1979). The adverse impact test should not be applied so broadly that it renders this limitation meaningless.

In enacting Title VII, Congress also sought to protect "'management prerogatives . . . to the greatest extent possible.'" *Id.* at 206 (quoting H.R. Rep. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963)); *accord Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). It would be difficult to imagine a more serious infringement on management prerogatives than a requirement that all employment decisions must either be

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[20] The courts themselves might wonder, for example, how they would go about professionally validating the subjective procedures they use to identify those elusive qualities that distinguish excellent law clerks. Would the courts have to use an industrial psychologist who would create a selection procedure and "choose the domain to be assessed, construct the items to which test takers will respond or select the behaviors to be observed, develop scoring scales and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound"? APA Br. at 9. The courts would have to confront this question unless the use of quotas guaranteed that no race, gender or ethnic group suffered adverse impact in selection for law clerk positions.

subject to informal quotas guaranteeing an absence of adverse impact or be professionally validated in every respect by industrial psychologists. That is precisely the principle that petitioner seeks to establish here.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

PAUL GROSSMAN
Counsel of Record
PAUL, HASTINGS, JANOFSKY
& WALKER
555 South Flower Street
Los Angeles, CA 90071
(213) 489-4000

PATRICK W. SHEA
PAUL, HASTINGS, JANOFSKY
& WALKER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 223-9000

Attorneys for *Amicus Curiae* The Merchants and Manufacturers Association

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER, P.C.
GAREN E. DODGE *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

WILSON
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6139

CLARA WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

The Equal Employment Advisory Council (EEAC or Council) respectfully submits this brief as amicus curiae in support of the Respondent. The parties' written consents have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote sound approaches to the elimination of employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations, which themselves have hundreds of employer members interested in the foregoing purposes. The Council's governing body is a Board of Directors composed of experts and specialists in equal employment opportunity. Their combined experience gives the Council a unique understanding of the practical, as well as the

legal, aspects of equal employment policies and requirements. The members of the Council are committed firmly to the principles of nondiscrimination and equal employment opportunity.

Substantially all of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, the statute involved herein. As a result, EEAC's members are vitally concerned about the specific issue before the Court in this case, whether a plaintiff may challenge a subjective promotion practice or procedure under the disparate impact theory of Title VII when the disparate treatment theory is more appropriately used. Most employment decisions involve the use of subjective criteria; relatively few are based on objective factors alone. EEAC's members are concerned that the application of the disparate impact theory to subjective criteria would effectively bar even their wholly legitimate use,[1] because the practical difficulties and costs of "validating" subjective criteria would make the employer's rebuttal burden under that theory virtually insurmountable in most instances. Accordingly, EEAC's members will be affected directly by the rule of law this Court adopts in deciding what is an appropriate cause of action under the disparate impact theory.

EEAC has filed amicus curiae briefs in numerous cases concerning the permissible applications of the disparate impact theory. In *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), the first federal circuit court case to address the issue, EEAC argued that employers are not barred by Title VII from using subjective

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[1] There is nothing inherently wrong with an employer's using some element of subjectivity in making employment decisions, as long as subjective criteria are applied in a nondiscriminatory manner. Merely because a practice or discriminatory criterion is subjective in nature does not mean that it is discriminatory *per se*. *Hill v. Seaboard Coast Line R.R. Co.*, 767 F.2d 771, 775 (11th Cir. 1985); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981). *See* Argument II, *infra*, at pp. 18-23.

criteria in making promotion decisions, particularly where adequate safeguards exist to prevent the criteria from being applied discriminatorily. EEAC also filed an amicus brief in *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*), a case which held that the disparate impact analysis may be applied to Title VII claims involving subjective employment practices, but that plaintiffs must prove a causal connection between specific employment practices or criteria and a disparate impact upon a protected class. In addition, EEAC filed a brief in *Green v. USX Corp.*, Nos. 86-1554 & 86-1568 (3d Cir.) (decision pending), another case concerning whether the disparate impact analysis properly can be applied to discrimination claims arising from subjective employment practices.[2]

Finally, because of its interest in the types of proof required under the two theories, EEAC also has filed amicus curiae briefs with this Court concerning statistical and standard of proof issues under Title VII. *See, e.g., Bazemore v. Friday*, 106 S. Ct. 3000 (1986); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

STATEMENT OF THE CASE

Clara Watson (Watson), a black former bank employee, sued Fort Worth Bank & Trust (the Bank), claiming that she was discriminated against in violation of Title VII, 42 U.S.C. § 2000e, *et seq.* and Section 1981,

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[2] The Council also filed an amicus brief in *American Federation of State, County, and Municipal Employees, AFL-CIO v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985), and *Spaulding v. University of Washington*, 740 F.2d 686 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984), dealing with the question of whether the disparate impact theory may be used to challenge an employer's pay practices under the comparable worth theory.

42 U.S.C. § 1981. With regard to the issue of promotions, the issue relevant to this Court, Watson used both statistical and non-statistical evidence in an attempt to prove that she had applied for, but was improperly denied because of her race, four promotions to supervisory positions. The Bank countered that the supervisors making these promotion decisions had used some "fifty or a hundred" subjective criteria—such as personal judgment—in making the promotions, and that such judgments were not discriminatory. *See* Joint App. at 135.

The district court, after denying class claim status to Watson's allegations, ruled that she had failed to show that the Bank's articulated reasons were pretextual, and that she had presented "little or no evidence" of discrimination in any of the Bank's promotion decisions. C.A. No. 4-81-581-E (N.D. Tex. 1984) at 13. Analyzing Watson's claim as a disparate treatment case, the court found specifically that Richard Burt and Patricia Cullar, workers who were chosen for promotions over Watson, were more qualified than Watson because of their experience, performance evaluations, or near completion of a college degree. *Id.* at 8. Significantly, the district court then concluded that the promotion of Kevin Brown, the promotion most fervently challenged in the Petitioner's brief, was adequately explained because Brown's supervisor "regarded [him] highly" based on his supervisory experience, because Watson "was out on sick leave" when the position became available, and because Brown "got along" better than Watson with co-workers. *Id.* at 9.

The Fifth Circuit agreed that Watson's claim was properly analyzed "as an individual disparate treatment claim," 789 F.2d at 797, and that the district court's finding that the Bank did not intentionally discriminate on the basis of promotions was "not clearly erroneous." *Id.* at 799. Significantly, the Fifth Circuit held that Watson could not *also* use the less burdensome "disparate impact" theory, because "this Court's recent precedent establishes that a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under

the disparate treatment model rather than the disparate impact model." *Id.* at 797.

SUMMARY OF ARGUMENT

For several reasons, the disparate impact theory of Title VII should not be applied to discrimination claims involving practices or criteria that are subjective in nature. First, application of the theory to these types of claims would conflict with the fundamental legal principles that distinguish disparate impact from disparate treatment analysis. Subjective employment criteria necessarily require the exercise of judgment by the employer, *McRae v. General Dynamics*, 774 F.2d 1171 (8th Cir. 1985), and thus are inherently based on intent. Therefore, only the disparate treatment theory, which focuses on "purposeful or intentional discrimination," *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 464 U.S. 937 (1982), should be used to analyze such devices. Indeed, this Court consistently has applied *only* the treatment model when reviewing discrimination claims involving subjective selection devices, *see, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and numerous circuit courts have adopted that view, *see, e.g., Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982).

Second, for practical reasons, the disparate impact theory is inappropriate for claims involving subjective practices or criteria. Title VII does not foreclose employers as a matter of law from using subjective criteria in making promotion decisions, particularly where adequate safeguards exist to prevent the criteria from being used discriminatorily. *E.g., Pouncy v. Prudential Insurance Co.*, 499 F. Supp. 427 (S.D. Tex. 1980) *aff'd*, 668 F.2d 795 (5th Cir. 1982). No Court has held that validation of subjective criteria constitutes such a safeguard. Indeed, validated procedures can result in substantial impact against blacks. Linn, "Ability Testing: Individual Differences, Prediction, and Differential Prediction," *Abil-*

ity Testing (National Academy of Sciences 1982). And using subjectivity to determine who is the "best qualified" candidate clearly is permissible under Title VII. *Johnson v. Transportation Agency of Santa Clara County*, 107 S. Ct. 1442, 1457 n.17 (1987). In fact, nothing in Title VII requires businesses to adopt the " 'best' hiring procedures" or requires an employer to "pursue . . . the course which would both enable [it] to achieve [its] own business goal *and* allow [it] to consider the *most* employment applications." *Furnco Construction Corp.*, 438 U.S. at 577-78 (emphasis in original). Moreover, as a practical matter, if plaintiffs are permitted to rely on the statistically oriented impact theory in attacking subjective practice, *any* showing of a statistical disparity sufficient to establish a *prima facie* case will inevitably lead to a finding of discrimination, because it is virtually impossible for an employer to show the "business necessity" of such practices by using statistical and other empirical validation methods. Thus, employers would face a costly and insurmountable rebuttal burden—a result that is especially unwarranted where, as here, the court finds that the employer did *not* act with discriminatory intent.

Finally, the arguments to the contrary advanced by Watson and the amicus American Psychological Association—that subjective criteria can and should be validated—are not persuasive. First, the technical literature simply does not support the proposition that promotion criteria can be validated in the same meaningful way as objective criteria. In fact, a close examination of the technical standards, cited by the APA as the "most authoritative source" for its arguments, reveals they do not even apply to the facts presented herein. Just as importantly, the attempted "validation" of subjective criteria—and even the sole use by employers of objective criteria—will still have to be examined for the existence of discriminatory application, a function already served by the treatment theory.

ARGUMENT

I. THIS COURT SHOULD NOT APPLY THE DISPARATE IMPACT THEORY TO CLAIMS INVOLVING SUBJECTIVE EMPLOYMENT PRACTICES OR CRITERIA, BECAUSE THE DISPARATE TREATMENT THEORY IS UNIQUELY SUITED TO SUCH CLAIMS

As shown below, the Fifth Circuit properly analyzed Watson's claim under the treatment theory, because she challenged hiring criteria that are subjective in nature. Since it is clear that only the disparate treatment theory, not the disparate impact theory, should be used when subjective practices or criteria are challenged, EEAC urges that the decision of the court below be affirmed.

A. Subjective Practices, Such As The Promotions Made By The Supervisors In This Case, Are Based Upon The Intent And Judgment Of The Persons Applying Them

The starting point for determining which theory of Title VII is appropriate when "subjective" practices or criteria are involved is a clear understanding of the nature of such a practice or criterion. Here Watson concedes that the Bank's promotion decisions were "purely subjective," *see* Brief for the Petitioner at 6, 11, but for purposes of analysis, it is important to distinguish the two.

The Second Circuit has described a "subjective decision making process" as one that is not exclusively comprised of "quantifiable or objectively verifiable selection criteria which are mechanically applied . . ." *Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984). The Eighth Circuit has observed that "[a] subjective personnel procedure, by definition, functions not solely through facially objective measures of ability, but employs judgment and intuition in conjunction with objective measures, such as education and demonstrated skills, to achieve its ends." *McRae v. General Dynamics*, 774 F.2d 1171 (unpublished slip op. at 4) (8th Cir. 1985), *quoted in Emmanuel v. Marsh*, 628 F. Supp. 564, 569 (E.D. Mo. 1986) (emphasis

added), *aff'd*, *Paige v. Marsh*, No. 86-1282 (slip op.; available on Lexis) (8th Cir. Feb. 13, 1987); *see also* 3 A. Larson & L. Larson, *Employment Discrimination* § 76.34 at 15-87 to 15-88 (When there is discretionary decision-making, "there is simply no neutral factor involved . . . what is going on is an ad hoc decision process in which a subjective judgment is being made about an individual"). In short, a subjective employment practice or criterion is inherently based on the judgment, the motivation, the state of mind, and the intent of the person applying it.

B. The Burdens Of Proof Under The Disparate Treatment Theory Properly Focus Upon Alleged Intentional Discrimination In Subjective Practices, While The Burdens Under The Disparate Impact Theory Are Most Suitable For Claims Involving The Discriminatory Effect Of Facially Neutral Employment Practices

To attempt to use the impact theory under the facts presented herein would improperly destroy the clear distinction between that theory and the disparate treatment theory. That clear and sensible distinction is apparent in the unique focus, and in the contrasting burdens of proof, under the two theories.

Disparate treatment, the theory Watson properly attempted to use initially, is concerned with those situations where an employer "simply treats some people less favorably than others *because of* race, color, religion, sex, or national origin." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (emphasis added). Proof of discriminatory motive is the central inquiry. *Id.* Disparate impact, on the other hand, concerns specific "practices, procedures or tests," *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971), "that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another," *Teamsters*, 431 U.S. at 335 n.15. Proof of discriminatory motive is not required. *Id.* Thus, the central focus of the disparate treatment theory is the employer's

intent, whereas the impact theory concerns the possible discriminatory effect of a seemingly neutral employment practice or criterion.

This distinction in focus is reflected in the difference in the burdens of proof under each theory. Under disparate treatment, the concern with intent is reflected in the *prima facie* requirement that the plaintiff satisfy the four requirements established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973),[3] or otherwise produce evidence "adequate to create an inference that an employment decision was *based on* a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358 (1977) (emphasis added). Similarly, the employer's rebuttal burden under disparate treatment to "articulate some legitimate, *nondiscriminatory reason*" for a challenged action, *McDonnell Douglas*, 411 U.S. at 802 (emphasis added), reflects a concern with intent.

In contrast, disparate impact's focus on the discriminatory effect of specific employment devices is revealed in the *prima facie* requirement that the plaintiff prove that a "facially neutral employment practice" has caused a significantly discriminatory impact on a protected class of employees. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). As for the rebuttal burden, the employer must show a "business necessity" for the challenged practice or criterion, *Griggs*, 401 U.S. at 431 (1971), or that it is otherwise "job related," *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). This, too, reflects the

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[3] *McDonnell Douglas* requires the plaintiff to show "(1) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802. These four requirements are not an inflexible formula, but "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

impact theory's focus on neutral or objective, not intentional or subjective, devices.[4]

Clearly, Watson did not point to a "facially neutral employment practice," *Teal*, 457 U.S. at 446, the threshold requirement for establishing disparate impact. Rather, Watson claimed the Bank's promotion decisions were "based on a discriminatory criterion," *Teamsters*, 431 U.S. at 358, the classic disparate treatment focus. Moreover, Watson did not point to the employment practice that *caused* the discriminatory impact, *Dothard v. Rawlinson*, 433 U.S. 321, 328-29 (1977); she failed to isolate which practice out of the "fifty or a hundred" led to the alleged discrimination. Thus, as properly analyzed by the Fifth Circuit, the disparate treatment theory, which focuses on intent, is the only theory that is logically applicable to Watson's claim in this case.[5] Accordingly,

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[4] As explained fully in n.18, *infra*, statistics can be used to prove and rebut allegation of discrimination under either theory. In addition, both theories permit the plaintiff to show "pretext" if the employer satisfies the rebuttal burden. Under treatment analysis, to show pretext the plaintiff must prove that the proffered reasons for the challenged action were not the true reasons and that the true reasons were intentionally discriminatory. *McDonnell Douglas*, 411 U.S. at 804-05. Under impact analysis, pretext is shown by demonstrating that other practices or criteria without a discriminatory effect would meet the employer's needs equally well. *Albemarle Paper*, 422 U.S. at 425. Again, the burdens match the basic focus of each theory.

[5] Although this Court has noted that the same set of facts may sometimes give rise to the application of both theories, Watson failed to allege such facts herein. This Court stated in *Teamsters*, 431 U.S. at 335 n.15 that "[e]ither [the treatment or impact] theory may, of course, be applied to a particular set of facts." Typically, this would occur where an objective selection criterion results in a racial disparity that is statistically significant. Under such a scenario, a plaintiff could proceed under both theories, alleging that the employer used the objective criterion to effectuate a discriminatory intent. It should not, however, be mistakenly inferred from the applicability of both theories of liability to a particular set of facts that *either* theory can apply to *any and all* sets of facts. As shown in Argument IB above, the two theories, even where applied to the same set of facts, serve completely

the Fifth Circuit properly declined to rely also upon the disparate impact theory.

C. As Recognized In The Opinions Of This And Other Courts, Because Discriminatory Intent Is The Central Focus Of The Treatment Theory, And Because Subjective Practices Are Inherently Intent-Based, Only The Treatment Theory Should Be Used To Analyze Claims That Subjective Employment Practices Are Discriminatory

1. *Because Subjective Practices Are Intent-Based, This Court Has Consistently Applied The Disparate Treatment Theory To Determine Whether Such Practices Violate Title VII*

As shown above, because subjective practices, such as the promotion decisions made by supervisors in this case, are intent-based, the disparate treatment theory is uniquely suited to analyzing such practices. This Court, in fact, has consistently applied only the treatment model when reviewing discrimination claims involving subjective selection practices or criteria. The underlying reason, of course, is that "[p]roof of discriminatory motive is critical" under the treatment theory. *Teamsters*, 431 U.S. at 335 n.15.

This Court first adopted the impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), as a judicial gloss on Section 703(a)(2) of Title VII.[6] *Griggs* held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discrimi-

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different roles, and function differently in the fulfillment of Title VII's policies.

[6] Section 703(a)(2) provides:

> It shall be an unlawful employment practice for an employer— * * * to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(2) (1981).

natory employment practices." 401 U.S. at 430. The "practices, procedures or tests" at issue in *Griggs* were requirements for a high school education and a passing score on a standardized general intelligence test. The Court found those requirements to be in violation of Title VII because they operated to exclude blacks at a disproportionately high rate, and were insufficiently related to the jobs for which they were used. *Id.* at 431-34.

In the cases decided after *Griggs*, this Court has interpreted Section 703(a)(2) to prohibit facially neutral employment practices or criteria (like the high school diploma and test score in *Griggs*) that operate to discriminate against protected classes of employees. Unlike the "subjective" decisions made herein, this Court's application of the disparate impact analysis has been limited to the narrow context of facially neutral practices or criteria. For example, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), applied the impact theory to employment "tests" that "select[ed] applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." *Id.* at 425. Again, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court relied on the impact theory in reviewing a rule that excluded women from a disability plan based on pregnancy. In addition, *Dothard v. Rawlinson*, 433 U.S. 321 (1977), presented the Court with height and weight criteria that adversely affected women and could not be shown to have a "business necessity." The Court recognized that in dealing with such "facially neutral qualification standards" impact analysis should be applied, and emphasized that a *prima facie* case is shown under the impact theory by demonstrating that the particular criteria in question actually cause the selection of applicants in a discriminatory manner. *Id.* at 328-29.[7]

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[7] *See also Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (impact analysis applied to rule denying accumulated seniority to employees returning to work after pregnancy); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (impact theory

In stark contrast to these "impact" cases, this Court's "treatment" cases have analyzed a different type of employment practice: subjective decisions. For example, in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973), this Court contrasted a subjective decision to dismiss an employee for misconduct with the types of objective devices that were at issue in *Griggs*. The Court noted that *Griggs*:

> *dealt with standardized testing devices* which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions . . . *Respondent, however, appears in different clothing . . .*[*His employer*] *does not seek his exclusion on the basis of a testing device* which overstates what is necessary for competent performance, or through some sweeping disqualification . . .

411 U.S. at 806 (emphasis added). This Court then vacated the lower court decision, which had applied the *Griggs* requirement of "job-relatedness" to the employer's reasons for the subjective dismissal decision. *Id.* at 805-06.

Significantly, in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), this Court also expressly contrasted devices like those at issue in *Griggs* with subjective practices or criteria. The plaintiffs in *Furnco* challenged practices by which the employer hired only persons he considered to be experienced and competent or who were referred to him as similarly skilled. The Court refused to apply the impact theory, noting that the case "*did not involve employment tests* . . . or particularized requirements such as . . . height and weight specifications . . ." *Id.* at 575 n.7 (emphasis added). Justice Marshall, after distinguishing the treatment theory from the impact

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used to review anti-narcotics rule); *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (in applying impact theory to analyze a written test used to determine eligibility for promotion, the Court emphasized that that theory focuses on "practices, procedures, or tests." *Id.* at 448).

theory, dissented "from the Court's apparent decision . . . to foreclose on remand further litigation on the *Griggs* question of whether [the employer's] hiring practices had a disparate impact." *Id.* at 583 (Marshall, J., concurring in part and dissenting in part). *See Hazelwood School District v. United States*, 433 U.S. 299 (1977) (applying disparate treatment analysis to plaintiff's attack on subjective hiring procedures); and *Teamsters*, 431 U.S. 324 (applying treatment analysis to challenge of subjective hiring and promotion decisions).

Accordingly, it is clear that while this Court has never expressly held that the impact theory is unavailable for challenges to subjective practices, it has carefully guarded the distinction between the disparate impact and the disparate treatment theories of Title VII. Consistently, this Court has applied disparate impact *only* to claims challenging facially neutral employment practices or criteria that adversely affect a protected class of employees. Moreover, the Court has explicitly distinguished such cases from those in which subjective practices or criteria, like those involved herein, are challenged. Accordingly, this Court should uphold its prior decisions, and thereby affirm the decision by the Fifth Circuit below.

2. *Numerous Reasoned Decisions By Courts Of Appeals Also Have Recognized The Propriety Of Using Only The Treatment Theory To Analyze Subjective Employment Decisions, And Other Courts Have Required Plaintiffs To Prove Causation At A Minimum*

Numerous circuit courts, including the Fifth Circuit below, also have recognized that claims involving subjective practices or criteria should be analyzed under the disparate treatment theory, not the impact theory. For example, the Fifth Circuit in *Pouncy v. Prudential Insurance Co.*, 668 F.2d 795 (5th Cir. 1982), addressing for the first time whether the impact analysis should be applied to a plaintiff's wide-ranging attack on multiple

employment practice or criteria, decided that the disparate impact theory is inappropriate for such an attack. In doing so, the court held that the theory "applies only when an employer has instituted a specific procedure . . . that can be shown to have a causal connection to a class based imbalance in the work force," 668 F.2d at 800. Rather, only "facially neutral" practices or criteria are amenable to the required showing of a causal connection. *Id.* at 801. As if foreshadowing the facts presented herein, the court in *Pouncy* explained:

> *None of the three Prudential "employment practices" singled out by the appellant*—the failure to post job openings, the use of a level system, and *evaluating employees with subjective criteria—are akin to the "facially neutral employment practices" the disparate impact model was designed to test.* Unlike educational requirements, aptitude tests, and the like, *the practices identified by Pouncy are not selection procedures to which the disparate impact model traditionally has applied.* See 3 A. Larson & L. Larson, Employment Discrimination § 73.00 (1981 & 1981 Supp.).

Id. (emphasis added).[8]

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[8] Other Fifth Circuit cases agree. *See Trevino v. Holly Sugar Corp.*, 811 F.2d 896, 902 (5th Cir. 1987) ("challenges to employment practices that rely on subjective selection criteria must be analyzed under the disparate treatment theory of discrimination, which requires a finding of intentional discrimination"); *Cunningham v. Housing Auth. of City of Opelousas*, 764 F.2d 1097, 1099 (5th Cir.), *cert. denied*, 106 S.Ct. 530 (1985), *quoting Walls v. Mississippi State Dept. of Public Welfare*, 730 F.2d 306, 321-22 (5th Cir. 1984) ("The use of subjective criteria to evaluate employees in hiring is analyzed, not under the disparate *impact* model, but instead under the disparate *treatment* model."); *Carroll v. Sears, Roebuck & Co., Inc.*, 708 F.2d 183, 188 (5th Cir. 1983) ("The use of subjective criteria . . . is not within the category of facially neutral procedures to which the disparate impact model is applied."); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 817 (5th Cir.) ("Travenol's interviewing cannot be viewed as a neutral practice with a disparate effect thus subject to *Griggs* . . ."), *cert. denied*, 459 U.S. 1038 (1982). *But c.f. Page v. United States Industries, Inc.*, 726 F.2d 1038, 1045-46 (5th Cir. 1984) (disparate

Three other circuits agree with the Fifth. The Second Circuit, in *Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984), has held that "The disparate impact theory has been used mainly in the context of quantifiable or objectively verifiable selection criteria which are mechanically applied and have consequences roughly equivalent to results obtaining under systematic discrimination." *See Rossini v. Ogilvy & Mather, Inc.*, No. 85-7776 (2d Cir. Aug. 14, 1986). In addition, the Fourth Circuit, in *Brewster v. Barnes*, 788 F.2d 985, 993 (4th Cir. 1986), recently held that a plaintiff's challenge to subjective employment practices brought under the impact theory should have been brought under the disparate treatment theory. *See EEOC v. Federal Reserve Bank*, 698 F.2d 633, 638-639 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984); *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274, n.10 (4th Cir. 1980). And the Eighth Circuit, in *Paige v. Marsh*, No. 86-1282 (slip op; available on Lexis) (8th Cir. Feb. 13, 1987), recently elucidated the "less than clear" case law in that circuit,[9] noting that "a disparate impact claim may not

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treatment and disparate impact theories used to analyze "subjective promotional system").

[9] The Eighth Circuit in *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1132-1133 n.6 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981) previously held that the disparate impact theory is not available to challenge a subjective decision-making process. *See Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981) ("A subjective decision-making system . . . is not the type of practice outlawed under *Griggs* and cannot alone form the foundation for a discriminatory impact case."); and *Talley v. United States Postal Service*, 720 F.2d 505, 507 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (same). While the Court in *Gilbert v. City of Little Rock*, 722 F.2d 1390, 1397-1398 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984) allowed the plaintiff in that case to use the disparate impact theory without identifying an objective, neutral employment practice, *Gilbert* did not even refer to the Eighth Circuit's prior decisions in *Taylor*, *Harris* and *Talley*, indicating that the case may have been decided without the benefit of complete briefing. At any rate, the Eighth Circuit has now sided with the Bank herein.

be based on subjective evaluation and promotion procedures." [10]

Two other circuits, the Seventh and Tenth, have both issued opinions that support the Bank's position that only the treatment theory should be used to analyze subjective practices. While aberrant decisions in these two circuits have resulted in a possible split between panels, and thus *dicta* that appear at first glance to be citable for the propositions advanced by Watson, these cases are not necessarily in conflict with the arguments made by the Bank herein.[11]

Obviously, this issue has not been settled in the circuits. But it is also clear that the law in four circuits—the Second, Fourth, Fifth and Eighth—directly supports

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[10] While a decision in one other circuit, the Third, is currently pending, *Green v. USX Corp.*, Nos. 86-1554 & 85-1568, that circuit recently completed oral arguments. Previously, however, the court has observed in *Massarsky v. General Motors Corp.*, that "[a] plaintiff alleging disparate treatment . . . bears the ultimate burden of persuading the jury that his treatment was 'caused by *purposeful or intentional discrimination*'" 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983), *quoting Smithers v. Bailar*, 629 F.2d 892, 898 (3d Cir. 1980) (emphasis added). The court further stated that plaintiffs may invoke the treatment model where the employer's treatment of the employee has been "expressly race-based or sex-based," while the disparate impact theory "applies when the employer's adverse action resulted *not from any discriminatory motive* but simply from application of *facially neutral criteria* that are alleged to have a disproportionate impact on members of the protected class." *Id.* (emphasis added). *See also Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (characterizing the impact theory as applicable to "practices that are facially neutral"). By ruling out the impact theory whenever motive is involved, the court essentially adopted the position that subjective practices or criteria (which necessarily involve motive) should be analyzed only under the disparate treatment model, not the impact model.

[11] For example, while *Bauer v. Bailar*, 647 F.2d 1037, 1043 (10th Cir. 1981), applied the disparate impact theory to subjective hiring and promotion decisions, the court in that case considered it important that the selection decisions were comprised of both subjective and objective hiring components. *Bauer* is thus clearly distinguishable from the case at bar; here the plaintiffs *concede* that the decisions are subjective.

the Bank's position in this case, and that three more circuits have issued recent decisions that point strongly in the same direction.[12] Even the Ninth Circuit's recent decision in *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*), held that plaintiffs must prove a "causal connection" between challenged practices and their alleged impact. *Id.* at 1482.[13] *See Peters v. Lieuallen*, 746 F.2d 1390, 1392 (9th Cir. 1984) (cited in *Atonio*).[14] As a result, many reasoned decisions in the courts of appeals lend persuasive support to this Court's clear distinction between the treatment and impact theories. Accordingly, this Court should affirm the decision of the Fifth Circuit below.

II. THIS COURT SHOULD NOT APPLY THE DISPARATE IMPACT THEORY TO ANALYZE SUBJECTIVE EMPLOYMENT PRACTICES BECAUSE, AS A PRACTICAL MATTER, SUCH AN APPLICATION WOULD REQUIRE INORDINATE EXPENDITURE UPON VALIDATION OF EMPLOYMENT CRITERIA, IMPOSE AN INSURMOUNTABLE REBUTTAL BURDEN UPON EMPLOYERS, AND IMPROPERLY ELIMINATE THE LEGITIMATE USE OF SUBJECTIVITY IN EMPLOYMENT DECISIONS

As discussed in Argument IB above, the disparate impact theory requires plaintiffs to show that a "facially

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[12] Clearly, therefore, the statement by the amicus American Civil Liberties Union that "[o]nly one Circuit, the Second, has refused to apply disparate impact analysis to subjective criteria," Br. at 30 n.32, is incorrect.

[13] To the extent it is unclear in a particular case whether a criterion or procedure is objective or subjective, EEAC contends that in any event, it is an essential prerequisite that the plaintiff establish a causal connection between a particular criterion and a workforce imbalance before the impact theory may be used.

[14] Of course, other circuits have held that subjective decisions may be challenged under the impact theory. *See Griffin v. Carlin*, 755 F.2d 1516, 1524-1525 (11th Cir. 1985); *Segar v. Smith*, 738 F.2d 1249, 1270-1272, 1288 n.4 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); and *Rowe v. Cleveland Pneumatic Co. Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982). These cases are wrong and should be overruled.

neutral" employment practice has a significantly discriminatory impact upon a protected class, *Teal*, 457 U.S. at 446. To correspond with that exacting requirement, when a plaintiff makes a *prima facie* showing of disparate impact, the employer bears the heavier burden of proving that the challenged practice or criterion has a "business necessity," *Griggs*, 401 U.S. at 431, or that it is "job related," *Albemarle Paper Co.*, 422 U.S. at 425. Typically, as explained fully in Argument III below, the employer proves "business necessity" by "validating" the challenged device, or showing by statistical or other empirical proof that it measures factors which are necessary for satisfactory job performance.

The use of subjective criteria is not illegal *per se* under Title VII, *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir. 1975), and an employer's decisions properly may be based on subjective factors, *see, e.g., Hamilton v. General Motors Corp.*, 606 F.2d 576, 580 (5th Cir. 1979). Requiring employers to prove business necessity to justify subjective practices, however, will, in effect, condemn all such criteria—regardless of how they are used. Proof of "business necessity" will require an inordinate expenditure for validation devices, a substantial loss of discretion, and a considerable restructuring of most employment decision making, if the result advocated by Watson is adopted by this Court. These expenditures by employers are not "minimal" as argued by Watson and her amici. Rather, professional industrial psychologists usually must be hired to undertake the studies because most companies do not possess the expertise to do their own.[15] In fact, the measurement of

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[15] In this regard, there are 2500 American Psychological Association (APA) members who belong to its division of Industrial and Organizational Psychology, but only 1500 of its members belong to its Division of Evaluation and Measurement. APA Brief at 1. Since the *Uniform Guidelines on Employee Selection Procedures* cover some 666,000 employers (627,000 private and 39,000 public), see Appendix, each Division of Evaluation and Measurement member will have to perform evaluations for, on average, 444 employers. Clearly, this is an impossible task, making incredible the assurances

one simple characteristic reportedly costs up to $100,000, according to a 1979 study. Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law. 633, 643. By simple extrapolation, it is evident that the measurement of *multiple* characteristics, now some *8 years* after the Gwartney study, will cost far more, a burden that will be especially great upon small employers. And just because the federal government can afford to commission such a study, a fact pointed out by the NAACP Legal Defense Fund in its brief at 29, does not mean that smaller employers should be required to shoulder a similar burden. Indeed, even large employers have found it increasingly difficult to meet the validation requirements found in the technical literature. *See* Argument III, *infra*.[16]

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by the APA that the studies can be performed for *all* employment decisions, and that the standards can be applied with a sufficient degree of reliability to make the impact theory a viable method of analysis for the 49,000 occupational titles recognized by the U.S. Bureau of the Census. *See* Alphabetical Index of Industries and Occupations (1980) at III.

[16] In April 1976, David L. Rose, Chief of the Employment Section, Civil Rights Division, Department of Justice, stated in a memorandum to the Deputy Attorney General:

> Under the present [1970] EEOC *Guidelines* few employers are able to show the validity of *any* of their selection procedures, and the risk of their being held unlawful is high. Since not only tests, but all other procedures must be validated, *the thrust of the present guidelines is to place almost all test users in a posture of noncompliance*; to give great discretion to enforcement personnel to determine who would be prosecuted; and to set aside objective selection procedures in favor of numerical hiring.

122 Cong. Rec. 22590 (daily ed. July, 1976) (Emphasis supplied). *See* Sharf, "Personnel Testing and the Law," *Personnel Management* (K. Rowland & J. Ferris, eds.) (1982). The 1970 EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, referred to in the memorandum, subsequently were supplanted by the 1978 *Uniform Guidelines*. Former EEOC staff psychologist James C. Sharf, has commented, however, that: "While the *Uniform Guidelines* offer at least a choice between validation strategies that the 1970 EEOC *Guidelines* did not, the documentation requirements now add considerably to the likelihood that a full compliance review will find an employer to be in noncompliance . . ." Sharf at 178.

Subjective practices, as shown in Argument III below, are not easily susceptible to the validation process because they are judgmental and nonquantifiable in nature. *See McDonnell Douglas*, 411 U.S. at 802, 806 n.21 (subjective processes involve "predictive evaluation[s]" that are "resistant to empirical proof"); A Larson & L. Larson, *supra*, § 76.34 at 15-87 to 15-88. As a result, employers would have a virtually impossible burden in showing that a subjective practice or criterion has a business necessity—a disadvantage that is especially unwarranted where (as here) a court finds that the employer did *not* act with discriminatory intent.[17]

Because of these practical realities, if plaintiffs were permitted to rely on the statistically oriented impact theory in attacking subjective devices, any showing of a statistical disparity sufficient to establish a *prima facie* case would inevitably lead to a finding of discrimination. Intent "would become a largely discarded element" of the disparate treatment theory, and "the distinction between disparate impact and disparate treatment would diminish." *Griffin v. Bd. of Regents of Regency Universities*, 795 F.2d 1281, 1288 n.14 (7th Cir. 1986), *quoting Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1133 (1985), *en banc*, 810 F.2d 1477 (9th Cir. 1987).[18]

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[17] In addition, where a challenged practice or criterion is largely subjective, it is impossible to make a showing of causation, making the impact model's rebuttal burden even more impractical. One commentator has observed that "[a]pplying a disparate impact analysis to subjective decision making is troubling because statistics will not necessarily show that the subjective nature of the practice *caused* the racial or sex imbalance." Denis, *Subjective Decision Making: Does It Have a Place in the Employment Process?*, 11 Empl. Rel. L.J. 269, 277-78 (1985) (emphasis added). Causation cannot easily be shown in this context because a subjective practice or criterion is not easily "quantifiable or objectively verifiable," *Zahorik*, 729 F.2d at 95, but rather is based on intent. Thus, the only meaningful inquiry when analyzing a subjective practice is not causation, but what can be inferred about intent from the evidence.

[18] Watson and her *amici* rely on *Atonio* to argue that this Court should permit subjective criteria to be scrutinized under the impact theory. Otherwise, they argue, it will be impossible to prove

Moreover, as the Seventh Circuit in *Griffin* has recognized:

> Rather than becoming an irrelevant factor as envisioned, race (or sex, etc.) could then become an overriding factor in employment decisions. *Employers with work forces disproportionate to the minority representation in the labor force could then face the choice of either hiring by quota or defending their selection procedures against Title VII attack. We do not find such a result has been mandated* by Congress or through Supreme Court interpretation of Title VII. Therefore, practices and policies such as . . . subjective decision making, . . . which are not facially neutral, lend themselves far better to scrutiny for intentional discrimination.

795 F.2d at 1288 n.14 (emphasis supplied).[19]

Another practical effect of the result advocated by Watson would be the elimination of subjectivity in hiring

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intent that is hidden by a "routine adherence to past practices whose original purposes are undiscoverable." 810 F.2d at 1484. Such an argument, however, overlooks the fact that statistics of sufficient magnitude can still be used to infer intent under the treatment theory. *See Hazelwood*, 433 U.S. at 307. In fact, the Fifth Circuit below permitted Watson to do so, emphasizing that "the plethora of statistics which Watson introduced at trial" was still relevant to her allegations, both in "establishing a prima facie case of discrimination" and in "attempting to prove that the reasons proffered by the [Bank] for its action [were] either unworthy of credence or mere pretexts for discrimination." 798 F.2d at 798. But the court found "no indication in the record, nor [was there] any suggestion . . . by Watson . . . that the district court neglected to consider the statistical evidence presented by Watson in terms of evaluating the credibility of the Bank's proffered explanations for its promotion decisions." *Id.* at n.13.

[19] Clearly, Title VII does "not require employers . . . to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination," *Local 28 of Sheet Metal Workers v. EEOC*, 106 S.Ct. 3019, 3038 (1986). *See also Johnson v. Transportation Agency of Santa Clara County*, 107 S.Ct. 1442 (1987). However, if plaintiffs are permitted to rely on the disparate impact theory in attacking subjective practices or criteria, such a requirement may be the *de facto* result.

and promotion. But, clearly, Title VII does not (and *should* not) prohibit employers from using some element of subjectivity in making employment decisions, as long as subjective criteria are applied in a nondiscriminatory manner. As many courts have stressed, just because a practice or criterion is subjective does not mean that it is discriminatory *per se*. *Hill v. Seaboard Coast Line R.R. Co.*, 767 F.2d 771, 775 (11th Cir. 1985); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981). Indeed, as this Court stated in *Johnson*:

> "[i]t is a standard tenet of personnel administration that there is rarely a single 'best qualified' person for a job. *An effective personnel system will bring before the selecting official several fully-qualified candidates* who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, *final determinations as to which candidate is 'best qualified' are at best subjective.*"

107 S. Ct. at 1457 n.17, quoting Brief for American Society for Personnel Administration as Amicus Curiae at 9 (Emphasis added).

Thus, for practical reasons, Watson should not be permitted to use the disparate impact theory in her attack on the Bank's subjective promotion criteria.

III. THE UNIFORM GUIDELINES AND PROFESSIONAL STANDARDS DO NOT SUPPORT THE PROPOSITION THAT ALL SUBJECTIVE DECISIONS, SUCH AS THE PROMOTION DECISIONS MADE HEREIN, CAN AND SHOULD BE VALIDATED, AND THIS COURT SHOULD DECLINE TO SO RULE

A. Introduction

Watson and the amicus American Psychological Association (APA) claim that the technical standards and principles that have been developed by educational and

industrial psychologists for administering employee selection tests are fully applicable to the instant analysis. Specifically, the APA contends that the subjective criteria used by the supervisors herein to promote other employees instead of Watson should be judged against the procedures contained in the *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1978) (*Uniform Guidelines*), the *Principles for the Validation and Use of Personnel Selection Procedures* (1987) (*Principles*), and the *Standards for Educational and Psychological Testing* (*Standards*) (1985).[20]

As shown below, however, the *Uniform Guidelines*, *Principles* and *Standards* fail to provide meaningful guidance to this Court's analysis of the instant case, because true validation of objective employee selection devices differs significantly from the so-called "validation" of subjective selection procedures or criteria. Moreover, even where subjective procedures *have* been validated does not mean they are reliable in predicting future job performance.[21]

B. Because The Uniform Guidelines And Professional Standards Provide Technical Assistance In The Administration Of Tests For Employee Selection, But Fail To Provide Meaningful Guidance In Assessing Many Promotion And Other Subjective Criteria, They Do Not Support The Proposition That All Subjective Decisions Can And Should Be Validated

In its brief, the APA states that industrial psychologists "routinely" validate "both objective devices such as

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[20] The *Uniform Guidelines*, *Principles* and *Standards* each serve a different purpose. The *Guidelines* presumably provide employee selection guidance that is consistent with Title VII and professional practice. The *Standards*, adopted by the APA and others, serve as a technical guide addressing a broad range of psychometric issues, one of which is employment. In contrast, the *Principles*, adopted by the Society for Industrial and Organizational Psychology, focus solely on the problems associated with test development and other employment decisions.

[21] Reliability means the extent to which a particular subjective characteristic would receive the same evaluation from several people. Ghiselli, *Theory of Psychological Measurement* 208 (1964).

standardized ability tests . . . and purely subjective . . . devices such as interviews, performance appraisal ratings, constructed performance tests, nonscored experience and biographical data intake sheets, and structured behavioral sample tests." APA Br. at 14. Conveniently, the APA then categorizes the "three selection devices" used by the Bank herein as "interviews, supervisor's ratings, and experience requirements," *id.* at 4,[22] and concludes that the Bank "den[ied] promotion to a member of a protected class" without applying "generally accepted professional standards," *id.* at 23, such as the *Uniform Guidelines*, *Principles*, and *Standards*.

The APA's characterization, however, of the Bank's promotion criteria as "selection devices" points dramatically to the fundamental flaw in its arguments. Certainly, the *Guidelines*, *Standards* and *Principles* provide meaningful assistance to educational and industrial psychologists who are administering standardized "tests" and reliable, structured "selection devices." But the decisions at issue herein are promotion decisions that are not based upon standardized "tests" or reliable, structured "selection devices," but rather upon criteria that are not readily quantifiable and, therefore of unknown reliability. In fact, the *Standards*, *Principles* and *Uniform Guidelines*, examined individually below, are not even helpful in analyzing the subjective promotion decisions made herein because each presumes the reliability of the "selection device," a presumption unwarranted in this case (and indeed in most selection decision making based on subjective criteria).

First, the APA's reliance upon the 1985 *Standards* in the promotion context is simply misplaced. In fact, the *Standards* themselves distinguish the true "selection de-

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[22] Clearly, the bank relied on many more criteria than the three identified by the APA. See District Court decision at 8-9. The creation by the APA of these three "convenient categories," therefore, amounts to little more than the setting up—and knocking down—of the "straw man."

cisions" that they were designed to address from "promotion decisions" such as those made herein:

> *Promotion decisions are distinguished from selection decisions* largely by the fact that the individual who is being considered for promotion has an established job performance record in the organization. Thus, the employer may know considerably more about that individual than is known about new applicants. *An employer will need to decide to what extent job performance information should be combined with test information.*

Id. at 59 (emphasis added). Moreover, it is clear that the *Standards* "were never intended to be, nor are they well suited to become, rules of law." Comment, *Courts, Psychologists, and the EEOC's Uniform Guidelines: An Analysis of Recent Trends Affecting Testing as a Means of Employee Selection*, 36 Emory L.J. 203, 218 (Winter 1987). Rather, the *Standards* contain their own "cautions" as follows:

> The *Standards is a technical guide that can be used as the basis for evaluating testing practices.* Evaluating the acceptability of a test or test application does not rest on the literal satisfaction of every primary standard in this document, and acceptability cannot be determined by using a checklist. *Specific circumstances affect the importance of individual standards. Individual standards should not be considered in isolation. Therefore, evaluation acceptability involves the following: professional judgment* that is based on a knowledge of behavioral science, psychometrics, and the professional field to which the tests apply; the degree to which the intent of this document has been satisfied by the test developer and user; the alternatives that are readily available; *and* research and experiential evidence regarding *feasibility.*

Standards at 2 (emphasis added). As explained, the *Standards* recognize that subjective criteria can not be quantified because they are inherently intent-based.

Inexplicably, the APA in its brief, calls these *Standards* "[t]he most authoritative source . . . to be applied to determine the technical adequacy of assessment devices, the appropriateness of specific applications of these devices, and the reasonableness of inferences based on the results of these devices. . . ." Br. at 6. However, the brief fails to point out that:

> The purpose of publishing the *Standards* is to provide criteria for the evaluation of tests, testing practices, and the effects of test use. Although the evaluation of the appropriateness of a test or application should depend heavily on professional judgment, the *Standards* can provide a *frame of reference* to assure that relevant issues are addressed. The *Standards does not attempt to assign precise responsibility for the satisfaction of individual standards. To do so would be difficult, especially since much work in testing is done by contractual arrangement.* However, all professional test developers, sponsors, publishers, and users should make reasonable efforts to observe the *Standards* and to encourage others to do so.

Standards at 2. Thus, given their limited function as merely a "frame of reference," *Standards* at 2, the APA's reliance upon these *Standards* as the "authoritative source" is clearly suspect.

Similarly, the *Principles*, by their very terms, are of limited assistance to the analysis herein. Significantly, the *Principles* declare that "there is no clear path to truth" in determining whether bias exists. *Principles* at 10. "A difference in criterion scores . . . could reflect bias in raters, equipment, or conditions, *or it might reflect genuine differences in performance.*" *Id.* (Emphasis added).

If bias is not measurable, or even readily recognizable, it is clear that there is no way to "validate" the types of criteria used by the Bank herein that will be of much use to employers or courts in determining whether a promotion system is discriminatory. From a legal point of view, the mere fact that there is a difference in the result of a selection device—even a patterned interview—

does not mean that the difference was a result of discrimination. Stated differently, the so-called validation of subjective criteria will not "eliminat[e] the most common nondiscriminatory reasons" for the employer's actions. *Burdine*, 450 U.S. at 254.

Clearly, therefore, the *Principles* may be helpful to industrial psychologists as "principles of good practice," *Principles* at 1, but they are obviously not appropriate as legal rules of minimum employer behavior. Furthermore, if literally applied, the *Standards* and the *Principles* would make the burden of defending unstructured appraisals substantially greater than that of defending standardized tests since *each* evaluator's decision making would have to be shown to be valid, whereas standardized testing does not treat each test administrator as a source of bias. *See Standards* at 16.

Similarly, the *Uniform Guidelines* provide little assistance in determining whether promotions and other truly subjective decisions are discriminatory. First, the language of the *Guidelines* mirrors the *Standards* in many respects, and were, in fact, established to be consistent with the 1974 *Standards*. *See* 29 C.F.R. § 1607.5(C). Of course, as shown above, the *Standards* clearly were not intended to serve as legal requirements, especially when dealing with promotion decisions. *See* 36 Emory L.J. at 251. Second, even though the *Guidelines* ostensibly apply to "any employment decision," 29 C.F.R. § 1607.2(B), the inability to eliminate bias and other human-error problems renders the *Guidelines* nearly valueless in measuring subjective criteria. Even the APA's brief, in its discussion of the methods by which subjective decisions theoretically can be "validated," Br. at 9-22, admits that bias can enter the validation process in many forms.[23]

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[23] The APA's brief, in explaining the many ways human judgment can enter the process, states as follows:

> Industrial psychologists and others who create a test or other selection procedure must choose the domain to be assessed, construct the items to which test takers will respond or select

Even if, for purposes of argument, the *Guidelines* are taken at face value—that they apply to "promotion" and other subjective decisions—such a bold assertion simply makes the *Guidelines* themselves overbroad. The APA treats the *Guidelines* as if they are substantive rules, entitled to great deference in this case.[25] But they are not. Rather, as the Second Circuit has stated, the *Guidelines* "are useful as a source of guidance, but they need not be adhered to in every detail as if they were substantive regulations." *Guardians Ass'n of New York City v. Civil Service*, 630 F.2d 79, 110 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 3083 (1981). As one commentator stated:

> To demand in the Guidelines a higher level of test development and validation than is currently attainable is improper. It places virtually all employers in a posture of noncompliance and enables the en-

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the behaviors to be observed, develop scoring scales and norms so that results can be interpreted, prepare manuals, and most importantly, ensure that the instrument is psychometrically sound.

Id. at 9. The brief also states that the validity of any performance appraisals may be dependent upon "the race of the rater and ratee," *id.* at 18, and the "skill of the rater," *id.* at 20. Even the *Standards* themselves attempt to limit the effect of "[e]xpert judgment" when substantiating a claim of construct-related evidence. *Standards* at 61. Certainly potential bias renders this so-called validation little more than another human effort to keep discrimination out of the selection process—not the scientific, purely quantifiable, air-tight process claimed by the APA. Thus, the APA's own description of the *Standards* shows that individual judgment permeates their application. As we showed in Arguments IA and IB, such judgments are properly evaluated under the disparate treatment theory.

[25] In 1971, this Court in *Griggs* at 434 stated that EEOC's 1970 *Guidelines on Employee Selection Procedures*, 35 Fed. Reg. 12,333 (1970), *withdrawn*, 43 Fed. Reg. 38,312 (1978) were "entitled to great deference." Since then, courts have criticized the 1970 Guidelines, as well as their 1978 replacements, either as outdated or as unsupported by current interpretations of Title VII. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (Burger, C.J., dissenting). *See also*, Report by the U.S. General Accounting Office, *Uniform Guidelines on Employee Selection Should be Reviewed and Revised* (1982).

> forcement agencies to use the Guidelines as a litigation vehicle against even those employers who have instituted "state-of-the-art" selection procedures.

Potter, *Employee Selection: Legal and Practical Alternatives to Compliance and Litigation* at 6 (National Foundation for the Study of Equal Employment Policy, 2d ed. 1986).

Accordingly, it is clear that the *Guidelines*, *Principles* and *Standards* fail to provide meaningful guidance in analyzing whether promotions and many other subjective decisions have been made in a discriminatory manner, and they certainly do not support the APA's argument that all subjective decisions can and should be truly "validated." While a form of "validation," loosely defined, can be used in an attempt to restructure subjective criteria to make them more quantifiable (*i.e.*, the use of a "scored" interview in place of "impressions or feelings"), the validation procedures contained in the *Guidelines*, *Standards* and *Principles* clearly are not useful in resolving the issues before the Court in the instant case.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the decision of the Fifth Circuit, disallowing the application of the disparate impact theory to the subjective promotion criteria at issue in this case, be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER, P.C.
GAREN E. DODGE *
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae
Equal Employment
Advisory Council

November 27, 1987

* Counsel of Record

APPENDIX

[SEAL]

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Washington, D.C. 20507

November 20, 1987

Garen Dodge
McGuiness & Williams
1015 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Dodge:

This letter is in response to the request for data on November 10, 1987.

- ☒ The data are enclosed.
- ☐ We substituted data which may be useful (see comments below).
- ☐ We are unable to fill your request in its entirety because

Comments:

If you need further assistance, please contact Clarice Bryce, at (202) 634-7062.

Sincerely,

/s/ Doris M. Werwie
DORIS M. WERWIE
Survey Division

RECORD MAINTENANCE REQUIREMENTS

UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Type of Employer	More than 100 Employees	Between 15 and 100 Employees
Private	45,000	582,000
State and Local Government	3,500	8,500
Elementary and Secondary Districts	5,000	9,000
Higher Education	3,000	—
Joint Apprentice Programs	—	5,000
Referral Unions	3,000	—
Federal Government	2,000	—
Total by Size Group	61,500	604,500
Total	666,000	

Employer and Employment Coverage

Uniform Guidelines on Employee Selection Procedures

Employment Size Ranges	Total Employers [1]	Total Employment (In Millions)
Total, 15 or more	666,000	71.2
15-99	604,500	29.0
100-249	27,600	4.1
250 or more	33,900	38.1

[1] Includes joint apprentice programs and referral unions.